FILED
NOV 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-747

PENT-R-BOOKS, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

HERBERT MONTE LEVY
Attorney for Petitioner
9 East 40th Street
New York, N. Y. 10016

Table of Contents.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional, Statutory and Regulatory Provisions Involved	5
a) Constitutional provisions	5
b) Statutory provisions	6
c) Regulatory provisions involved	10
Statement of the Case	11
Proceedings in the District Court	16
Proceedings in the Court of Appeals	16
POINT I. The holding below that there is a case or controversy between the parties hereto conflicts with Article III, Section 2 of the Constitution as previously construed in applicable decisions of this Court	17
POINT II. Automatic issuance of an injunction against one trying to comply with the law, solely because of such compliance effort, when better compliance cannot be insured and the public interest is not served by issuance of an injunction, is against federal law. This presents a substantial federal question not heretofore determined by this Court	20

Page

POINT III. The Court should reexamine its decision in *Rowan,* in the light of the then unforeseen negative effects of the Pandering Law upon freedom to disseminate Constitutionally protected material to those who wish to receive it, and the subsequent acts of the Government in acting as censor 21

POINT IV. When neither the Trial Court nor the parties there considered the Federal Rules of Evidence applicable to cases begun in 1969 and 1972, they should not be applied in an appellate court for the first time so as to prevent a party from presenting evidence. In deciding otherwise, and in deciding that the Federal Rules of Evidence permit certification of papers found in Government files by any person who certifies them, the Court below decided important questions of federal law which have not been, but should be. settled by this Court 26

CONCLUSION. Certiorari should be granted to review the decisions of the Court below 29

APPENDIX A. Opinions in the Courts Below 27a-62a

APPENDIX B. Opinions of the District Court in Related Companion Cases 63a-94a

TABLE OF CASES.

Blount v. Rizzi, 400 U. S. 410 (1971) 23, 25

Erznoznik v. City of Jacksonville, 422 U. S. 205 (1975) 23, 24

Page

Golden v. Zwickler, 394 U. S. 103 (1969) 18

Hecht v. Bowles, 321 U. S. 321 (1944) 20

Lamont v. Postmaster General, 381 U. S. 301 25

Louisiana v. N.A.A.C.P., 366 U. S. 293, 296 (1961) 23

O'Shea v. Littleton, 414 U. S. 488 (1974) 18

Pent-R-Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971) 14

Rizzo v. Goode, 423 U. S. 362 (1976) 18

Rowan v. Post Office Dept., 397 U. S. 728 (1970) 12, 21, 22, 23, 25, 26

Shelton v. Tucker, 364 U. S. 479 (1960) 23

Ex parte Steele, 162 Fed. 694, 701 (1908) 18

Time, Inc. v. Hill, 385 U. S. 374, 389 (1967) 25

United States v. Stewart, unreported, Crim. No. 69-162 13

United States v. Treatman, 408 F. Supp. 944, 954 (C. D. Cal., 1976) 22

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 44 L. W. 4686, U. S. (1976) 20

Young v. American Mini Theatres, Inc., 44 L. W. 4999, U. S. (1976) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No.

PENT-R-BOOKS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Pent-R-Books, Inc., hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in 17 of 20 consolidated actions brought by the United States to obtain court orders requiring your Petitioner to comply with Postal prohibitory orders issued pursuant to the Pandering Law, 39 U.S.C. §3008, these being the 17 cases identified by docket numbers in footnotes 3 and 5, *infra*, at pp. 16, 17, all cases bearing the same title.

Opinions Below.

The opinion below, governing all the cases, is reported at 538 F. 2d 519; a copy thereof is appended hereto as

pages 1a-26a of Appendix A. No opinion was rendered on the denial of Petitioner's Petition for rehearing. Pages 26a-62a of Appendix A are the opinions of the United States District Court for the Eastern District of New York in the 17 consolidated cases here; they are not reported. Appendix B consists of opinions of the said District Court in companion cases, reference to which is necessary to ascertain some of the grounds of the judgments and decrees in Appendix A; these opinions, too, are unreported.

Jurisdiction.

The judgment and order to be reviewed was made and entered on June 28, 1976. An order denying a timely motion for rehearing was made and entered on August 3, 1976, while another order of even date stayed issuance of the mandate pending application to this Court for certiorari. On October 26, 1976, Mr. Justice Marshall of this Court granted an order extending the time for filing petition for writ of certiorari up to and including November 30, 1976. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 2101(c).

Questions Presented for Review.

(1) Whether there are any cases or controversies between the parties hereto within the meaning of Article III, Section 2 of the United States Constitution, (and whether, if there ever were such cases or controversies, they are now moot), where the United States, pursuant to the Pandering Law, 39 U.S.C. §3008, sought Court orders requiring petitioner to comply with certain Postal Prohibitory Orders requiring petitioner not to mail any advertisements to those persons who had previously found

its advertisements to be erotically arousing or sexually provocative, the Postal Service having previously found alleged violations of such Orders by second mailings to the complaining addressees, when (a) the second mailings complained of had been made in 1968 and 1969, but improved 1970 and 1971 computer programming to better comply with the law thereafter resulted in the alleged violation rate of less than one-quarter of one percent (0.025%) being reduced to less than four thousandths of one percent (0.004%), and a violation rate as found by the Courts for all years in less than five thousandths of one percent (0.0045%) of the cases; (b) neither petitioner nor any other entity using the same mailing lists has ever been alleged to have made a further violative mailing to a particular addressee after Postal adjudication of a violation *re* that addressee; and (c) after the Court below denied a petition for rehearing, the Postal Service amended its regulations to provide that prohibitory orders are void five years after the application of the complaining addressee for an administrative complaint from the Postal Service, and such five year period had expired in every case here even prior to the oral argument in the Court below.

(2) Whether a Court compliance order, enjoining a mailer from making a further mailing to an addressee who has complained pursuant to the said Pandering Law, is to be issued against an offending mailer solely because it made good faith improvements in its computerization to comply with the law, even abridging its own constitutional rights, when the compliance order can have neither force nor effect (since no one has been able to suggest any improvements in computer programming to better insure against second mailing), would be unjust to the defendant, and not in the publ interest, when such computer improvements were mad long prior to the judicial adjudications of violation of the Pandering Law?

(3) Whether the said Pandering Law, previously held constitutional by this Court in the absence of any evidence whatsoever of its operation and effect, should now be held unconstitutional as depriving petitioner of First and Fifth Amendments rights, when the necessary operation and effect of the Law are as follows: (a) in order to comply, it is necessary for a mailer, as here, to avoid the use of many rented mailing lists, and to use a computerization programming system, all of which deprives more than eight million people of receiving First Amendment material through the mail, though they had not asked to be protected from the same; (b) such over-broad computer programming is made necessary by the failure of the Law to prohibit only mailings to name variations supplied by the complaining addressees; (c) the complaining addressee, in any event, has the right under Postal regulations to refuse to accept mail before or after delivery, and return it unopened to the mail; (d) the Government has intervened as censor in Pandering cases, by never seeking judicial compliance orders to enforce Postal Prohibitory Orders against any of the business firms whose advertisements the Government does not deem to be of a sexually provocative or erotically arousing nature; (e) the statute has now been interpreted as interpreted below, to saddle the press with the impossible burden of verifying to an absolute certainty that a mailing be not made to one who has obtained a Prohibitory Order under the Pandering Law.

(4) (a) Whether the Federal Rules of Evidence, first effective in 1973, should be applied to determine the admissibility of evidence in Pandering Law cases involving certifications of administrative records long predating the effective date of the Federal Rules of Evidence, when neither the trial court nor the parties considered

the Federal Rules of Evidence applicable; and (b) whether, if applicable, Federal Rule of Evidence 902(4) permits certification of papers found in a government file, written by complaining addressees, to be validly made by any person who certifies them, such unsworn statements from complaining addressees then being admitted for purposes of proving the truth thereof, while the mailer has no power to depose any such complaining addressee, and hence is denied the right to cross examine and confront its accusers under the Sixth Amendment to the United States Constitution.

Constitutional, Statutory and Regulatory Provisions Involved.

a) Constitutional provisions.

Art. III, Sec. 2, U.S. Constitution: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States • • •; • • • —to controversies to which the United States shall be a party; • • •."

Amendment I, U.S. Constitution: "Congress shall make no law • • • abridging the freedom of speech, or of the press • • •."

Amendment V, U.S. Constitution: "No person shall • • • be deprived of • • • liberty, or property, without due process of law • • •."

Amendment VI, U.S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right • • • to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor • • •."

b) Statutory provisions.

Pandering Law, 39 U.S.C. §3008

Originally enacted as Title III of the Postal Revenue Salary Act of 1967, 81 Stat. 645, 39 U.S.C. §4009 (1964 ed., Supp. IV):

"§3008. *Prohibition of pandering advertisements*

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postal Service shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns

and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postal Service believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, it shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for its belief and request that any response thereto be filed in writing with the Postal Service within 15 days after the date of such service. If the Postal Service, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, it is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punishable by the court as contempt thereof."

Rule 44(a) of the Federal Rules of Civil Procedure.

Rule 44. Proof of Official Record.

(a) AUTHENTICATION.

(1) *Domestic.* An official record kept within the United States, • • • or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

RULES OF EVIDENCE

for

UNITED STATES COURTS AND MAGISTRATES

SUPREME COURT OF THE UNITED STATES

Monday, November 20, 1972

ORDERED:

1. That the rules hereinafter set forth • • • to be known as the Federal Rules of Evidence, be, and they hereby are, prescribed pursuant to Sections 3402, 3771, and 3772, Title 18, United States Code, and Sections 2072 and 2075, Title 28, United States Code, to govern procedure, in the proceedings and to the extent set forth therein, in the United States courts of appeals, the United States district courts • • •.

2. That the aforementioned Federal Rules of Evidence shall take effect on July 1, 1973, and shall be applicable to actions and proceedings brought thereafter and also to further procedure in actions and proceedings then pending, except to the extent that in the opinion of the court their application in a particular action or proceeding then pending would not be feasible or would work injustice in which event the former procedure applies.

Rules 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal.—A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal.—A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

> *(4) Certified copies of public records.*—A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this Rule or complying with any Act of Congress or rule adopted by the Supreme Court.

Note: Public Law 93-595, 88 Stat. 1926, cited in the opinion below [App. A, p. 17a, n. 17], enacted the above provisions of Rule 902. The preamble of said Public Law recited as follows, the law being enacted on Jan. 2, 1975:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.

c) Regulatory provisions involved.

Postal Service Regulations First Announced in U.S. Postal Bulletin of Aug. 12, 1976, effective July 28, 1976.

Section 123.65

Violations

> A person protected by a prohibitory order who receives a mail piece apparently in violation of such order should open the envelope or other outside cover of such mail piece and write thereon the identifying number of the prohibitory order (if known) and a statement indicating his receipt by mail and the date of receipt—e. g., "I received this mail piece (date)"—followed by his signature. The mail piece should then be submitted directly, or via a post office, to the postal services center which issued the order. Such submission will constitute an application for enforcement of the order. • • •.

Section 123.67

Void Orders

> A prohibitory order will be considered void upon expiration of five years from the date of issuance, except that when application for enforcement of a prohibitory order has been made, it will not be considered void until expiration of five years from the last application for enforcement. Postal Service files relating to such void orders may be disposed of provided a record is maintained of the disposal of each such file and the reason therefor.

Statement of the Case.

The cases before this Court are 17 of 20 consolidated cases in which the Government sought enforcement of Postal prohibitory orders in the federal district court, pursuant to jurisdiction conferred thereon by 39 U.S.C.

§3008(e). The Government is further seeking Court enforcement of Postal prohibitory orders against Pent-R-Books in 341 other cases, with more to follow, as set forth in the Government's Brief below, at p. 4. This petition is being filed so that the major legal issues may be finally resolved prior to an adjudication of the several hundred other cases, all involving whether judicial orders should issue enforcing Postal orders prohibiting further mailings to complaining addressees who found an earlier mailing from petitioner to be erotically arousing or sexually provocative.

Long prior to the effective 1968 date of the Pandering Law, petitioner, without any legal compulsion, always notified an addressee of an advertisement of its nature and contents thereof, on an envelope, so that an unwilling recipient thereof might refuse and return it at petitioner's expense (57a, 60a).[1] After enactment of the Law but before its effective date, a computerized system was set up to prevent second mailings to unwilling addressees and to those who had obtained Postal orders prohibiting such second mailings under the Pandering Law. The computer house used the services of the equivalent of 25 people working full time for six months (or 24,000 man hours) to set up and process the system (61a).

Within a few days of the effective 1968 date of the Pandering Law, a test case was begun by several mailers (not including your petitioner) of the constitutionality of said law. This Court granted certiorari, and in 1970 upheld the constitutionality of the Pandering Law, necessarily without any evidence before it of the actual operation and effect of the law. ***Rowan v. Post Office Dept.,*** 397 U.S. 728 (1970).

[1]Such references are to the consolidated Joint Appendix filed in the Court below, a copy of which will be filed with this Court.

Meanwhile, petitioner had mailed some 10,000,000 advertising pieces for "The Photographic Manual of Sexual Intercourse" (58a), which were later adjudicated to be protected by the First Amendment. ***United States v. Stewart,*** unreported, Crim. No. 69-162, Order dated October 13, 1971. About 450,000 copies of the book were sold, and some 248,500 Postal prohibitory orders under the Pandering Law were issued against petitioner (58a, 64a, 80a). The Postal Service has brought some 500 administrative complaints of violations of prohibitory orders by second mailings, or a claimed violation of less than one quarter of 1% (0.025%) of all the prohibitory orders issued against petitioner.

The cases at bar are all the result of second mailings allegedly made in 1968 and 1969. Drawing upon its experience in those and subsequent years, petitioner made improvements, beginning in 1970, to fully insure against second mailings to those protected by prohibitory orders. Five improvements were made in 1970.

1) The use of many rented mailing lists was abandoned, since the only practical way to insure against second mailings to those on such lists was to run a magnetic tape of the complaining addressees (a "kill tape") against a magnetic tape of a rented mailing list, making mailings possible only to a mailing list already on magnetic tape, or requiring the purchase of a list (rather than rental) to permit petitioner to put the list on tape. This prevented petitioner from mailing its advertisements to an estimated 8,000,000 persons between 1970 and 1973 (68a). (All the mailings involved herein were to names on rented mailing lists, see, *e. g.*, 79a-80a).

2) Duplicate mailing labels were eliminated to avoid the erroneous use of such a label after the effective dates of prohibitory orders (70a).

3) The optical scanner which matched names of complaining addressees on the so-called "kill" tape with those on mailing lists could not exercise judgment; an R.A. Jones would not be eliminated by the "kill" tape if the name supplied by the Post Office was Richard A. Jones. Accordingly, the computer was reprogrammed so that all persons with the same last name at the same address as the complaining addressee would not receive petitioner's mailings.

4) To further guard against problems of slight variations, reprogramming was instituted to automatically remove from the mailing list the name of any person at the same address as the complaining addressee who had the same first five letters in his last name—even if such other persons had sought mailings, and if the first names were different (72a). Thus, a prohibitory order obtained by a Schwartz at 295 Madison Avenue in New York City would result in all mailings being stopped to such address to anyone the first five letters of whose last name were S c h w a (72a).

5) When the new Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on an envelope or an inner sealed envelope, Pent-R abandoned its practice of notifying addressees of the nature and content of its ads, and instead followed the new law. See *Pent-R-Books, Inc. v. United States Postal Service*, 328 F. Supp. 297 (E.D.N.Y. 1971).

The Goldwater Amendment also required the cessation of mailings to persons on a Government supplied list of those who do not wish to receive sexually oriented ads from any source. The Post Office form, in accordance with that statute, advises the addressee as follows:

> "The name that you insert in the space provided should be the name by which you customarily receive mail. You may, if you wish, file separate applications for varying forms of your name."

Though the Goldwater Amendment did not prohibit mailings to name variations not supplied to the Government, a second mailing to a name variation of the complaining addressee under the Pandering Law, who had not supplied that variation to the Government, nonetheless resulted in Postal administrative complaint. Accordingly, in the Spring of 1971, a still further improvement was made, which eliminated, from mailing lists used by petitioner, the names of all persons on prohibitory orders and on the Goldwater list where the zip codes, the first three digits of the street address, and first five letters of the last name all coincide (72a-73a). This last precaution eliminated mailings to an estimated 50,000 persons who might desire them (75a), and to an A.P.O. address for *any* persons whose last name merely coincided. Thus, one Smith obtaining a prohibitory order at an A.P.O. address eliminated mailings to all Smiths at such A.P.O. address.

After the improvements, in 1972 and 1973, there were only some 10 administrative complaints issued against those using the mailing lists used by petitioner. Assuming all such complaints were valid, the maximum violation rate was then less than four-thousandths of one per cent (0.004%).[2]

Uncontradicted evidence was set forth in defendant's moving affidavits that the Government never sought even one court order to enforce a violated Postal prohibitory order against any of the dozens of business firms advertising non-sexual products, and has sought court or-

[2]The normal computer error rate is one half of one per cent (0.5%) (65a); the Postal Service admits to an error rate of higher than one per cent (1%) in its operations (82a-87a).

ders only when the first mailing was, in the judgment of the Post Office, of a sexually provocative or erotically arousing type. Thus, it was shown that, while prohibitory orders had been obtained against mailings made by such organizations as the American Civil Liberties Union and Practicing Law Institute, the Post Office, and its successor the Postal Service, completely failed to go into Court to seek a court order enforcing a prohibitory order, even where there had been a violation of the prohibitory order. The defendant's defiance of the Government to show otherwise was unchallenged (28a-29a).

Proceedings in the District Court.

The Government began 28 actions in the District Court seeking court orders requiring compliance with Postal prohibitory orders. It moved for summary judgment in all cases, while petitioner cross-moved for summary judgment. The Government successfully obtained summary judgment in 21 cases; it lost 7, appealed to the Second Circuit in those 7, and then withdrew its appeals.

Proceedings in the Court of Appeals.

Pent-R's appeals in 20 of the cases resulted in reversal and remand in 13,[3] reversal in 3,[4] with 4 of the judgments

[3]Second Circuit docket numbers, and corresponding District Court index numbers, 75-6014 (69 C 1363); 75-6015 (72 C 579); 75-6016 (72 C 580); 75-6017 (72 C 581); 75-6018 (72 C 582); 75-6020 (72 C 586); 75-6021 (72 C 587); 75-6022 (72 C 588); 75-6023 (72 C 598); 75-6024 (72 C 599); 75-6025 (72 C 600); 75-6026 (72 C 601); 75-6032 (72 C 612).

[4]Second Circuit docket numbers, and corresponding District Court index numbers, 74-2281 (69 C 1362); 75-6027 (72 C 602); and 75-6031 (72 C 611).

being affirmed.[5] This petition is filed to secure review of the judgments of the Court of Appeals insofar as they decided major legal questions unfavorably to petitioner, the Second Circuit having denied petitioner's timely petition for rehearing.

POINT I.

The holding below that there is a case or controversy between the parties hereto conflicts with Article III, Section 2 of the Constitution as previously construed in applicable decisions of this Court.

As the Court below noted (App. A, pp. 5a-6a), the alleged violation rate of Pent-R (and other corporations using the same mailing lists) was less than one quarter of 1% (0.025%) of the numbers of prohibitory orders issued. Of the 28 cases submitted to the courts by the Government, it has been successful in only 5. Projecting that same rate of success (5 out of 28, or 18%) against the claimed violation rate of 0.025%, the Government is likely to obtain compliance orders in only less than five-thousandths of 1% (0.0045%) of the cases. (The odds against any complaining addressee receiving a violative mailing are approximately thus more than 222,222,222 to 1.) Since the Post Office has adjudicated a total of some 500 violations, the percentage error rate applied to those 500 persons (multiplying 0.0045% by 500) shows that only 0.025% of a person—less than three hundredths of one per cent of a person—would stand a statistical chance of ever receiving a violative mailing from Pent-R.

[5]Second Circuit docket numbers, and corresponding District Court index numbers, 75-6019 (72 C 584); 75-6028 (72 C 603); 75-6029 (72 C 606); and 75-6030 (72 C 610).

Under such circumstances, we contended below, as noted by the Second Circuit (App. A at 5a), that there was no case or controversy. The Government nowhere rebutted our reasoning below, and the Second Circuit was silent on its reasons for rejecting our claim, notwithstanding our calling its attention to this in our Petition for Rehearing. Yet the *sub silentio* rejection of our argument is in conflict with Article III, Section 2 as previously construed in applicable decisions of this Court.

Thus, in *Golden v. Zwickler,* 394 U.S. 103 (1969), this Court found a lack of a substantial controversy of sufficient immediacy and reality because it was unlikely that a New York sitting Justice would again be a candidate for Congress—but such was more likely than that Pent-R, whose computer programming has never been criticized by the Government (constructively or otherwise), would violate a prohibitory order.

More recently, this Court has held that past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, if unaccompanied by any continuing present effect. *Rizzo v. Goode,* 423 U.S. 362 (1976); *O'Shea v. Littleton,* 414 U.S. 488 (1974). Here, neither Pent-R nor any other corporation using the same mailing list has ever been accused of a further violative mailing after Postal adjudication of a violation; the Government has been unable to suggest any improvement in Pent-R's programming, and injunctions "cannot have any practical legal effect upon the existing controversy", rendering the cases moot. *Ex parte Steele,* 162 Fed. 694, 701 (1908). The names and addresses of each complaining addressee have been fed into the computer's kill tape four times—upon receipt of the prohibitory order, receipt of the Postal complaint, receipt of the complaint filed in the District Court, and upon notice

of entry of judgment below—, and no injunction can possibly increase the effectiveness of Pent-R's computer programming.

A further reason for there being no case or controversy arose after the time to file a petition for rehearing below had expired. Under the August 12, 1976 Postal Bulletin, Sections 123.65 and 123.67 of the Regulations now provide that a prohibitory order will be considered void five years from the date of issuance, except that where an administrative complaint of violation had been sought, it will not be considered void until expiration of five years from the last application for the Postal Service complaint. Accordingly, all the Postal prohibitory orders in the cases at bar are now void, although the Government apparently now claims that judicial orders should now stand to enforce void administrative orders. We submit that, the underlying administrative orders now being void, there cannot now be any case or controversy over their judicial enforcement, for certainly a court cannot properly enforce a void order, nor properly continue in effect an order enforcing an order which has become void.

If these cases ever had any viability after Pent-R's 1970 and 1971 computer programming improvements, they can have none now. The Government not only wishes to beat a dead horse, but to have it run the race again.[6]

---

[6]We are not suggesting that the Court should merely vacate the judgments here, for the other serious legal issues raised in these cases persist in other later cases between the parties hereto, and in other later cases between the Government and others using the same mailing lists as Pent-R.

POINT II.

Automatic issuance of an injunction against one trying to comply with the law, solely because of such compliance effort, when better compliance cannot be insured and the public interest is not served by issuance of an injunction, is against federal law. This presents a substantial federal question not heretofore determined by this Court.

This Court held, in *Hecht v. Bowles,* 321 U. S. 321 (1944), that an injunction was not mandatory to enforce a compliance order when it would have no effect by way of insuring better compliance in the future, would be unjust to the defendant and not in the public interest. However, as the Court below noted, this Court has not held whether it is an abuse of discretion for a trial court to issue an injunction under such circumstances (App. A at pp. 6a-7a, *infra*).

In the case at bar, issuance of a court compliance order cannot possibly have any effect. Perhaps no previous similar case has been presented to the Court because no court previously has issued an order which is so totally lacking in force and effect. For there is nothing Pent-R can do, short of cessation of all mailing—which would violate its First Amendment rights under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 44 L. W. 4686, U. S. (1976)—to further comply with the Pandering Law.

The Court below predicated its affirmance of the compliance orders upon the trial court's finding that "[Pent-R's] liability to subjection to individual Compliance Orders of [the] court is the begetter of [its] praiseworthy compliance effort . . ." (App. A at 7a, *infra*). There was not a scintilla of evidence upon which to base

such finding; *per contra,* Pent-R had eliminated names and addresses of unwilling addressees long prior to the Pandering Law (57a), and its computer improvements had been made because of its good faith effort and diligence solely in attempting to comply with the Law (61a-63a, 65a), even abandoning its use of most rental lists (67a-68a) and circumscribing its own First Amendment rights (71a-72a, 75a-76a). And even were it true that Pent-R's efforts were spawned by its liability to subjection to court compliance orders, the ruling below would mean that one who complies with the law to avoid the issuance of an injunction thereby *per se* subjects himself to the very injunction that compliance should avoid. To state this proposition is to refute it.

This Court should determine whether a federal court may properly issue a compliance order, which can have neither force nor effect, when the defendant has in good faith made efforts to comply with the law, which efforts have been overwhelmingly successful, and when the Government has been unable to suggest any further efforts that should or could be taken.

POINT III.

The Court should reexamine its decision in *Rowan,* in the light of the then unforeseen negative effects of the Pandering Law upon freedom to disseminate Constitutionally protected material to those who wish to receive it, and the subsequent acts of the Government in acting as censor.

In *Rowan, supra,* this Court held for the right of a complaining addressee to be free from unwanted instrusion—a right to privacy which your petitioner has always

recognized, and indeed protected long before the enactment of the Pandering Law. However, as we showed above at pp. 13, 15, the operation and effect of the statute has been to necessarily prevent petitioner from making mailings protected by the First Amendment to an estimated 8,050,000 persons who have not asked to be protected from receipt of petitioner's mail—a practical factor in the implementation of the statute not considered by this Court in *Rowan*.

Such a result is inconsistent with the First Amendment, according to the decision of a recent three-Judge Federal Court in *United States v. Treatman*, 408 F. Supp. 944, 954 (C. D. Cal., 1976), which ruled as follows:

> "And when the government can prohibit the people from receiving material through the mail which the government thinks should not be sent, and which the recipients have not asked to be protected from, the entire concept of free speech and free communication is dealt a devastating blow."

While this blow was not intended by Congress in its enactment of the Pandering Law, and was certainly not considered by this Court in its decision in *Rowan*, the actual operation and effect of the statute is to prohibit millions of people from receiving mail from petitioner by the Government giving such authority to complaining addressees, though the millions of others have not asked to be protected from such mailings.

Had the Pandering Law provided for the supplying of alternative name formulations, with the provision that only those name formulations could not be mailed to, the statute as so narrowly drawn would have permitted many more mailings, and would not have necessitated petitioner's inability to make mailings to persons the first five letters of whose names may coincide with those of

complaining addressees in the same zip code area. This Court should consider whether the statute, having such an effect in its operation, is unconstitutional, because the ends of the statute could have been achieved without depriving petitioner of the right to mail to many. If the statute were construed to mean that it does not apply to names on rented lists (and all the mailings in the cases at bar were to names on rented lists), and that it applies only to mailings to persons on non-rented lists whose names are identical with those name formulations listed upon the prohibitory order, the statute might not be unconstitutional. But the courts below have not so construed it, and the decisions below are accordingly inconsistent with this Court's decisions in *Louisiana v. N.A.A.C.P.*, 366 U. S. 293, 296 (1961); *Shelton v. Tucker*, 364 U. S. 479 (1960); *Blount v. Rizzi*, 400 U. S. 410 (1971).

Before this Court decided *Rowan*, it was not told that complaining addressees have been advised by the U. S. Postal Service that "• • • you may always exercise your right under the provisions of Section 154.11 of the U. S. Postal Service Manual, to control delivery of your mail by refusing to accept it at the time it is offered for delivery. Also, after delivery, you may mark any matter 'Refused' and return it unopened to the mails, except registered, insured, certified or COD mail." Letter from U. S. Postal Service, Office of the Inspector in Charge, Newark, N. J. to Mr. R. L. Wolke, dated December 23, 1974, p. 2. Thus, this Court was not advised that a person could refuse to accept mail before or after delivery, and return it unopened to the mails.

This alternative remedy being available to a complaining addressee is a factor to be considered when attempting to square *Rowan* with this Court's later decision of *Erznoznik v. City of Jacksonville*, 422 U. S. 205 (1975),

which invalidated an ordinance prohibiting the showing of films containing nudity by drive-in theatres on the screen when visible from a public street or place. As Mr. Justice Powell recently explained *Erznoznik* in his concurring opinion in *Young v. American Mini Theatres, Inc.*, 44 L. W. 4999, U. S. (1976):

> "• • • Moreover, potential viewers who deemed particular nudity to be offensive were not captives; they had only to look elsewhere. *Id.*, at 210-12 • • •"

In cases under the Pandering Law, the addressee is less of a captive than one who drives by a drive-in theatre, and need only throw the second mailing into the waste-basket or mark it for return. Since he need only mark it for return, *Rowan* should be reconsidered in the light of *Erznoznik*.

Moreover, *Rowan* upheld the constitutionality of the Pandering Law, on the theory that no governmental censorship was involved, since the individual recipient controlled what mailing should be sent to him. However, in the case at bar, we alleged—without contradiction—that, according to the report of a Presidential Commission, prohibitory orders were issued against nearly 400 separate firms mailing sexually-oriented materials, and that orders were also issued against dozens of business firms advertising non-sexual products (28a). We further alleged that the Government never sought even one Court compliance order to enforce a Postal Prohibitory Order against any of the dozens of business firms advertising non-sexual products, seeking court orders only when the first mailing was, in the Post Office's judgment, of a sexually provocative or erotically arousing type. We cited as examples that no compliance orders were ever sought against mailings by such organizations as the American

Civil Liberties Union and the Practicing Law Institute, even where there has been a violation of the prohibitory order, defying the Government to show otherwise (29a). Not only did the Government fail to show otherwise, but it failed to deny these allegations. Hence, it is plain that such implementation of the statute, unforeseen and unforeseeable by this Court when it decided *Rowan*, has permitted the statute to become a vehicle of censorship by selective enforcement, constituting censorship, which of course is inconsistent with this Court's decisions in *Blount v. Rizzi*, 400 U. S. 410 (1971), and *Lamont v. Postmaster General*, 381 U. S. 301 (1965).

Additionally, the Court below put a gloss on the statute, not present in *Rowan*, when it ruled that a non-willful, non-negligent second mailing was sufficient *per se* to incur absolute liability for a court compliance order, in order to protect the complaining addressee's right to privacy. But such a ruling is contrary to this Court's holding in *Time, Inc. v. Hill*, 385 U. S. 374, 389, which refused to protect a person's right to privacy by saddling "the press with the impossible burden of verifying to a certainty the facts associated with a person's name, picture or portrait, particularly as related to non-defamatory matter", going on to rule that "A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait". Yet the Court below places, upon one who exercises First Amendment rights, the intolerable burden of requiring an impossible 100% error-free rate of compliance with administrative orders, though the effects of violation upon complaining addressees, if traumatic at all, are not anywhere as devastating as violation by a newsmagazine of a person's right to privacy.

For all these reasons, we urge that this Court re-examine its decision in *Rowan*.

POINT IV.

When neither the Trial Court nor the parties there considered the Federal Rules of Evidence applicable to cases begun in 1969 and 1972, they should not be applied in an appellate court for the first time so as to prevent a party from presenting evidence. In deciding otherwise, and in deciding that the Federal Rules of Evidence permit certfication of papers found in Government files by any person who certifies them, the Court below decided important questions of federal law which have not been, but should be, settled by this Court.

At no point whatsoever in the District Court did either of the parties hereto suggest that the 1973 Federal Rules of Evidence were applicable to these actions, all begun in 1969 and 1972, nor was the District Court ever of the opinion that the said Rules applied. *Per contra,* the parties and the Court agreed that Rule 44 of the Federal Rules of Civil Procedure governed the admissibility of the "certified" Post Office records (see, *e.g.*, App. B at p. 72a).

The Government urged on appeal, for the first time, that the records were admissible under Rule 902(1) of the Federal Rules of Evidence. The Court of Appeals, noting that we had claimed that the administrative records submitted by the Government in the subject cases were inadmissible because they were certified, not by a custodian of records as required by Rule 44(a)(1), Fed. R. Civ. P., but by a Postal official in Washington, D. C.

(App. A, p. 16a),[7] did not rule on whether or not our contentions were correct, but found that they do not require reversal in seven of the cases, because the record would be admissible under Rule 902(4) of the Federal Rules of Evidence, permitting authentication by a person authorized to make the certification, authority being assumed on the basis of his certification alone (App. A, at pp. 16a-18a). At a later point (App. A, at p. 21a), the Court below went on to note that Pent-R did not submit evidence to the Court below nor to the District Court, to counter the evidence contained in the administrative records, relying on the contention that the evidence did not meet the Government's burden on the motion. Of course, if the Government's evidence was inadmissible, then there was no need for Pent-R to counter the Government's evidence, for there simply would have been no evidence to counter.

The Government had not contended for the admissibility of the administrative records under Rule 902(4).

Obviously, in the opinion of the District Court and of the parties there, Rule 44 F. R. Civ. Pro., not Rule 902,

---

[7]Though the Court below recited that our claim was solely because of improper certification of the record by a postal official rather than by a custodian of the records, our claim, in the cited page of our brief, was that the certification did not comply with any other requirements of Rule 44(a), which require "attestation, a showing in the certification that the officer signing it has the legal custody of the record, or that he is the deputy of the person having such legal custody, and that the person signing the certification have his own seal of office." The Court below did not comment upon our other objections, but, without explanation, remanded the cases other than the seven which it found did not require reversal or consideration for determining whether the administrative record met the requirements of Rule 902 or Rule 44(a)(1). (App. A, p. 18a.)

was applicable. Even on appeal, the Government had not contended that Rule 902(4), relied upon by the Court below, was applicable. Under such circumstances, it is inequitable to hold Pent-R to the summary judgments rendered against it when it did not go forward with evidence to counter what clearly appeared to be inadmissible Government records.

Moreover, Rule 902(4) was improperly applied; even the Government had not contended for its applicability. For it was used, *inter alia,* to make admissible correspondence from complaining addressees, or their notations on envelopes, as to date of receipt of second mailings. These certainly are not provided for in Rule 902(4), which applies to "A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office * * *." 902(4) refers in its heading to "Certified copies of public records", and the material admitted hardly rises to such dignity.

Additionally, in construing Rule 902 to mean that authority to certify may be assumed on the basis of certification alone, the Court below lays down a dangerous rule permitting any bureaucrat to certify any document found in a government file, though he have no such authority. The disclosures of Watergate should militate against any such doctrine, which indeed permits certification by those having no authority to do so. We suggest that neither this Court nor Congress had any such intent in enacting the Federal Rules of Evidence.

Any rule to the contrary would result in a situation wherein an unauthorized person could certify correspondence received from complaining addressees, which is itself unsworn, without any opportunity to the mailer to

depose the complaining addressee prior to submission of a summary judgment motion. The unsworn statement certified by an unauthorized person then becomes enshrined as truth, subject only to whatever self-serving declarations or records might be made or produced by the mailer. This does violence to due process and the Sixth Amendment right to confront and cross-examine one's accusers. Surely this Court never intended any such result.

CONCLUSION.

Certiorari should be granted to review the decisions of the Court below.

Respectfully submitted,

HERBERT MONTE LEVY
Attorney for Petitioner

APPENDIX A.

Opinions in the Courts Below.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 625-644—September Term, 1975.

(Argued March 29, 1976 Decided June 28, 1976.)

Docket Nos. 74-2281, 75-6014—75-6032

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v—

PENT-R-BOOKS, INC.,

Defendant-Appellant.

Before:

OAKES and GURFEIN, *Circuit Judges,* and
PIERCE, *District Judge.**

Consolidated appeals from decisions of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* in twenty cases granting plaintiff's motions for summary judgment and commanding defendant to comply with postal prohibitory orders issued pursuant to the Pandering Law, 39 U.S.C. §3008.

Affirmed in part; reversed and remanded in part.

* Honorable Lawrence W. Pierce, United States District Judge for the Southern District of New York, sitting by designation.

HERBERT MONTE LEVY, New York, N.Y., *for Appellant.*

DAVID G. TRAGER (United States Attorney, Eastern District of New York, Paul B. Bergman, Josephine Y. King, and Constance M. Vecellio, of counsel), *for Appellee.*

PIERCE, *District Judge:*

This appeal, involving twenty cases consolidated for appellate purposes,[1] presents a variety of questions concerning the federal statute regulating the mailing of pandering advertisements, 39 U.S.C. §3008 (the Pandering Law).[2]

The Pandering Law was enacted by Congress because of a concern about the growing number of complaints received by the Post Office Department and members of Congress concerning the repeated receipt by individuals of unsolicited mail which was found by the individuals to be sexually provocative and offensive. See Senate Report No. 801, U.S. Code Cong. & Admin. News, 2258, 2294, 90th Cong. 1st Sess. (1967). The purpose of the statute was to provide a "procedure whereby any householder may insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes

---

1 The docket numbers of these cases, all of which bear the caption United States v. Pent-R-Books, Inc., are 74-2281 and 75-6014-75-6032.

2 In pertinent part, §3008, originally enacted as Title III of the Postal Revenue Salary Act of 1967, 81 Stat. 645, 39 U.S.C. §4009 (1964 ed., Supp. IV), provides:

"§3008. *Prohibition of pandering advertisements*

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to

to be erotically arousing or sexually provocative.' (citation omitted)." *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 729-30 (1970).

---

an order of the Postal Service to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postal Service shall issue an order, if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postal Service shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postal Service believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, it shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for its belief and request that any response thereto be filed in writing with the Postal Service within 15 days after the date of such service. If the Postal Service, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, it is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punishable by the court as contempt thereof.

"(f) Receipt of mail matter 30 days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

* * * *

Subsection (b) of the statute requires the Postal Service, upon notification by an addressee that he has received such mail matter and upon his request, to issue an order to the sender directing the sender to refrain from further mailings to the addressees named in the order which may include the complainant and his minor children. Such a prohibitory order applies to all mailings of any kind from the sender to the named persons. *Rowan* v. *Post Office Dept.*, *supra* at 734-35. Subsection (c) provides that the prohibitory order shall be effective on the thirtieth day following receipt by the sender and requires the sender to take certain steps including deleting the names of the designated persons from its mailing lists to insure the effectiveness of the order.

Subsection (d) requires the Postal Service, when it believes that such a prohibitory order has been violated, that is, that a second mailing has been sent to one of the designated addressees, to serve upon the sender a complaint stating the reasons for its belief. Subsection (d) establishes a procedure for a hearing before the Postal Service, and provides that if the Postal Service determines that a prohibitory order has been violated, it may request the Attorney General to seek an order from a United States District Court directing compliance with the prohibitory order. Subsection (e) grants the district courts jurisdiction to issue such a compliance order and provides that failure to comply with such an order may be punishable by contempt proceedings.

In each of the twenty cases before us, a prohibitory order was issued by the Postal Service to appellant Pent-R-Books, Inc. (Pent-R) with respect to a designated addressee. Thereafter, it was brought to the attention of the Postal Service that individuals who had requested the prohibitory orders had received second mailings from

Pent-R, whereupon complaints were issued and, thereafter, a determination was made by the Postal Service, either with or without a hearing, that the prohibitory orders had been violated. At the request of the Postal Service, the Attorney General brought these actions in the United States District Court for the Eastern District of New York seeking the issuance of compliance orders against Pent-R. The parties submitted the administrative record to the district court and made cross-motions for summary judgment without further proceedings in that court. In each of the twenty cases before us the district court entered an order granting the government's motion. It is from these orders that Pent-R appeals.

Pent-R's attacks on the judgments below range from charges that the Pandering Law is unconstitutional to claims that the administrative record before the district court was inadequate to support the entry of summary judgment in particular cases. First, Pent-R argues that the issue is moot, that there is no case or controversy, and that entry of compliance orders is not in the public interest because, since 1969 when the second mailings at issue were received by the complaining individuals, Pent-R has undertaken extensive efforts to assure that there is virtually no likelihood that the mailings would be repeated. Therefore, Pent-R argues, no purpose would be served by the issuing of compliance orders.

In support of this argument, Pent-R contends, as it did below, that as a result of sophisticated and costly computer operations instituted by the company since the enactment of the Pandering Law, it has effectively reduced the violation rate, that is, the number of valid complaints issued with respect to second mailings, to less than one quarter of 1% (0.025%) of the number of prohibitory orders issued to Pent-R in the last five years. In

addition, Pent-R contends that repeated requests to the Postal Service and the Justice Department of the United States for suggestions as to how Pent-R could modify its computer operations to improve its performance have been unavailing. Pent-R urges that it has no desire or intention to violate any prohibitory orders it has received or will receive. Thus, Pent-R claims it was an abuse of discretion for the district judge to enter the compliance orders in these cases.

The principal authority on which Pent-R relies for its position is *Hecht* v. *Bowles*, 321 U.S. 321 (1944). In that case the Supreme Court reviewed a ruling by the United States Court of Appeals for the District of Columbia which had reversed an order of the district court declining to issue an injunction against a department store found to have violated provisions of the Emergency Price Control Act of 1942. The district court had ruled that although the fact of violation was clear, the mistakes made by the store had been made in good faith and with no intent to violate the law. *Hecht* v. *Bowles, supra* at 325. The Court of Appeals reversed, holding that where a violation was found, issuance of an injunction was mandatory. The Supreme Court reversed this holding of the court of appeals.

Appellant would have us read *Hecht* as standing for the proposition that where the issuance of an injunction would have no effect in bringing about better compliance with a particular statutory scheme it is an abuse of discretion to issue an injunction. Even assuming that the factual premise for such a proposition is present here, i.e., that issuance of an injunction would serve no purpose in promoting compliance with the Pandering Law, the Court's decision in *Hecht* simply does not support appellant's position. While the Supreme Court reversed the holding in

Hecht that an injunction was mandatory whenever a violation was shown to have occurred, it specifically did not reach the question of whether the district court's refusal to enter an injunction was an abuse of discretion. It did not decide, or even imply, that it might be an abuse of discretion to issue an injunction in the factual circumstances of the *Hecht* case.

"In shaping equity decrees, the trial court is vested with broad discretionary power. . . ." *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973). See *Hecht* v. *Bowles*, supra at 329-30. The statute under consideration here expressly empowers the district court to issue a compliance order upon application of the Attorney General, once a finding has been made that a prohibitory order has been violated. §3008(d) and (e). There is no suggestion in the statute that either the Postal Service or the district court must determine that there is danger of yet a further violation of a prohibitory order before a compliance order may be issued. Moreover, the compliance order is in the nature of a civil, not a criminal order and carries no penalty with it. As Judge Dooling stated, "compliance orders are not punitive, but directory . . ."[3] Most importantly, however, we note that the court below herein did not issue compliance orders after having made a finding that an injunctive order would serve no purpose in furthering the goals of the statutory scheme. Rather, the court found that "[Pent-R's] liability to subjection to individual Compliance Orders of [the] court is the begetter of [it's] praiseworthy compliance effort. . . ."[4] We cannot say that Judge Dooling erred in this assessment. Nor do we find that under all the cir-

3 See unpublished opinion in 74-2281, cited in the Consolidated Joint Appendix (Appendix) at 92a-93a.

4 Id. at 93a.

cumstances presented by these cases the district judge abused his discretion in entering compliance orders.[5]

Appellant's constitutional attacks on the Pandering Law takes the form of claims that the statutory scheme deprives Pent-R of rights under the First Amendment. This issue was decided by the Supreme Court in *Rowan* v. *Post Office Dept., supra,* adversely to the position now urged by Pent-R.

Pent-R's First Amendment argument rests squarely on its contentions that both the material which it mails and its right to communicate with willing recipients of its literature are protected by the First Amendment. In *Rowan,* the Court explicitly and categorically rejected "the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even good ideas on an unwilling recipient." *Id.* at 738. And it makes no difference what the particular merits of appellant's literature might be or whether it has been held not to be obscene, as Pent-R contends occurred in a prior judicial proceeding.[6]

Pent-R claims that to comply with the present statutory scheme it must screen out many names from its mailing lists in addition to the names of those who have requested prohibitory orders. It suggests that if certain modifications of the statute were made, such as requiring complaining recipients of literature to list alternative formulations of their names to which no mailings should be sent, Pent-R

5 The circumstances of these cases do not require us to decide whether, upon a showing of a violation of a prohibitory order, the district court is required to issue an order of compliance. It is sufficient for these purposes to determine that here the court did not abuse its discretion by doing so.

6 See Appendix at 58a.

could comply with the statute without also eliminating the names of persons who have not requested prohibitory orders.

It appears that Pent-R's practice of eliminating these names has played no small part in bringing about its present excellent compliance record. Whatever the probable effect of the purposed statutory modifications, we must apply the statute as it exists, and we do not agree with the contention that the statute impermissibly infringes the constitutional rights Pent-R asserts it has with respect to its mailings.[7]

Appellant also contends that there is no justification for issuance of an injunction for a non-willful violation of a prohibitory order, particularly where such a violation occurred in connection with Pent-R's good faith efforts to exercise a First Amendment right to communicate with persons willing to receive its literature. Specifically, in several of the cases herein compliance orders were issued where the second mailings were to individuals whose names or addresses varied slightly from those listed on the prohibitory orders received by Pent-R, but who were in fact the same individuals.[8] Appellant claims that, as a prac-

7 We find the appellant's further argument that the Postal Service uses the statutory scheme to accomplish censorship of sexually oriented materials to be without merit. Since it is the addressee who determines he does not want the mail delivered, there is no public censorship of the kind with which the Supreme Court was concerned in cases such as *Blount* v. *Rizzi,* 400 U.S. 410 (1971).

8 For example: in 75-6031, the order prohibited mailing to B.W.S. Dodge at 122 Plantation Drive, Houston, Texas 77024; the second mailing was to B. Dodge at 122 Plantation Rd., Houston, Texas 77024. In 75-6028, the order prohibited mailing to Bradley W. Day at 16 Hemlock Trail, Trumbull, CT 06611; the second mailing was to B. W. Day at 16 Hemlock Trl., Trumbull, CT 06611. With respect to this particular instance, we note that the formulation of the addressee's name and address to which the second mailing was sent did appear on the prohibitory order although it appeared on that portion of the form

BEST COPY AVAILABLE

tical matter, compliance with the Pandering Law is possible only through use of computer technology, and since a computer will necessarily read slight variations in names or addresses as being different persons, even though a reasonable person viewing them would conclude that they referred to the same individuals, the second mailings could not be found to be willful and should not result in an injunction. Appellant contends further that its present computer operations and techniques are designed to prevent any such second mailings even to slightly different name and address variations and therefore the cases as to these complainants are moot. Such mailings according to Pent-R, could now occur only by computer error and thus should not form the basis for an injunction. We are therefore presented with the question of whether the district judge erred in issuing a compliance order under the circumstances presented here where a mailing reached a previous complainant although it was directed to a name or address varying slightly from that contained in a prohibitory order. We hold that this was not error.

There is no contention by the appellant that the persons who received the second mailings in these cases were not the persons to whom appellant intended to direct the mailings, i.e., there is no contention that the mailings were misdirected by the Postal Service. Appellant's contention is rather that in intentionally sending matter to the persons to whom the second mailings were addressed, appellant did not intend to direct it to persons who had previously requested prohibitory orders. Therefore, contends Pent-R, no compliance order should have issued.

Addressing this issue, the district judge stated:

---

which indicated who had previously received a mailing rather than on on that portion of the form which purported to list those persons to whom future mailings were prohibited.

> "It is no doubt true that defendant's methods of doing business made it difficult to avoid violation in this respect. Its computerized lists betray it on such occasions. But unfortunately defendant must be treated as though it had only a few short lists and a personal consciousness of all of its acts. Orders are directed to persons not to electronic devices. The complexity of defendant's business is not a defense against the claim of an individual addressee who has obtained an order directing defendant to make no further mailings to him; the statute is addressed not to facilitating defendant's business or imposing the least costly constraints upon it but to protecting the rights of individuals to be free of what they regard as an unwelcome intrusion." [9]

Judge Dooling states it well. If the fundamental purpose of the Pandering Act, which is, as the Supreme Court stated in *Rowan, supra*, to permit "a citizen to erect a wall" against unwanted advertising, is to be served, then the occurrence of a violation of a prohibitory order must be considered sufficient to warrant issuance of a compliance order.

In discussing the role of the district court with respect to compliance order proceedings the Supreme Court has described its role as "similar to that of the Postmaster General [now the Postal Service]. It is to determine whether the initial mailing included advertising material and whether there was a mailing by the sender to the addressee more than 30 days after receipt of the order." *Rowan* v. *Post Office Dept., supra* at 739 n.6. Nothing in the *Rowan* decision, the statute itself, or the legislative history supports appellant's view that a violation of a

---

9 See Appendix 980a-981a.

prohibitory order must be found to have been willful before a compliance order may issue. We decline to so hold here.

In so ruling, we note that the compliance order sought and issued pursuant to §3008(d) and (e) is not in the nature of a general injunction against the appellant. Rather, it requires only specific compliance with a previously issued prohibitory order. Further, appellant does not contend that there is no possibility that it might engage in a further violation of the statute, but rather argues that no such violation could be willful since it could result only from a computer error and this would occur only in rare instances. The case is therefore clearly distinguishable from those cases where a district court has declined to issue an injunction because it has found that there is no likelihood that a future statutory violation will occur. See, e.g., *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 60-61 (1975); *Hecht Co.* v. *Bowles, supra.* The argument with respect to willfulness is not properly raised at this stage of the statutory scheme. As Judge Dooling observed, willfullness and the good faith of appellant are considerations which would properly be considered by the court should a contempt proceeding be instituted following yet a third mailing. See, e.g., *United States* v. *Consolidated Productions, Inc.*, 326 F.Supp. 603 (C.D. Cal. 1971).

Appellant also raises a number of objections to the district court's entry of summary judgment in particular cases. With respect to seven of these cases,[10] the objection requires an interpretation of the provisions of §3008 which, under certain circumstances, create a rebuttable presumption that a second mailing was sent after the effective date of a prohibitory order and in violation

10 The seven cases bear docket numbers 74-2281, 75-6014, 75-6021, 75-6022, 75-6023, 75-6026 and 75-6027.

thereof. Pent-R contends that the presumption applies only to second mailings received by the complainant more than sixty days after the receipt by the sender of a prohibitory order. The district judge ruled that it applied to second mailings received more than thirty days after the receipt of the prohibitory order.

Subsection 3008(f) provides that receipt of a second mailing thirty days or more after the effective date of a prohibitory order creates a rebuttable presumption that the mail was sent after the effective date and is therefore in violation of the order. Section 3008(c) provides that a prohibitory order shall be effective on the thirtieth calendar date after its receipt by the advertiser. Since Pent-R does not date its mailings and the government introduced no direct evidence as to the actual date on which the second mailings were sent, the applicability of the presumption was an issue in each of these cases.

Read literally, the statutory presumption becomes effective only if the second mailing is received more than thirty days after the effective date of the prohibitory order, that is, more than sixty days after the receipt of the prohibitory order by the sender. The district court reasoned however that:

> "The statute cannot be supposed to have intended to double the grace period except in the case where the Post Office has evidence of the date of mailing. The use of the thirty day presumption period in exact correspondence with the thirty day period that precedes the effective date of the Prohibitory Order is the key to the meaning [of the statute]. If the offending mailing is shown to have been received after the effective date of the Prohibitory Order, it is presumptively a violation." [11]

11 See, e.g., unpublished opinion in 74-2281 cited at Appendix 106a-107a.

The court below concluded therefore that there must have been a "semantic slip" in the phrasing of subsection (f), a slip which the court proposed to correct by striking the word "effective" in the first use of that word in subsection (f).

We believe the district judge erred in this construction of the statute. The literal meaning of the statute is clear. There is nothing in the legislative history to support the conclusion that this literal meaning was not what Congress meant. Further, contrary to the view urged by the government here, we believe Congress might well have had good reason for allowing an additional time period following the effective date of a prohibitory order before the presumption that the mailing was sent in violation of such an order became effective.

It does not strain the doctrine of judicial notice to observe that it is not uncommon for mailings, even within the same city, to take more than one day to travel from sender to recipient. In fact, there was evidence in the record below of advertisements placed by the Postal Service itself seeking to explain why it might take as long as four days for such mailings to be completed.[12] According to the interpretation given to the statute by the court below and advanced by the government here, any mailings received by an addressee on the thirty-first, thirty-second or any subsequent day after receipt by the sender of a prohibitory order would be presumed to have been sent no earlier than the thirtieth day after receipt of the order and therefore in violation of the order. In many cases such a presumption would not be correct. For example, if, as is likely, an undated mailing which had been sent on the twenty-ninth day after receipt by the sender of a prohibitory order were to be received on the thirty-first day,

12 See, e.g., Appendix at 86a-87a.

the mailing would be presumed to have been made in violation of the prohibitory order, although clearly this would not be the case. In contrast, under the interpretation of the statute urged by appellant, even allowing for extraordinary delay between the sending and receipt of a second mailing, the presumption created by subsection (f) that a mailing had been sent after the effective date of a prohibitory order would almost invariably be correct if the mailing was received by the addressee more than thirty days after that effective date. In the absence of any evidence of a contrary Congressional intent regarding the presumption, we opt for the reading of the statute which is more likely to conform with the present day realities regarding delivery of mail.

In the seven cases with respect to which appellant has raised the issue of the construction of the statutory presumption the evidence contained in the administrative record purported to show that the second mailings were received on dates which were more than thirty, but less than sixty days after the effective dates of respective prohibitory orders. Since we disagree with the district court's interpretation of the presumption, we find that summary judgment was improperly granted in favor of the government in each of these cases.[13]

As previously stated, the cross-motions for summary judgment below were made and determined on the basis of the administrative records alone. Pent-R challenges the admissibility of much of this evidence on the dual grounds that the administrative records were inadequately certified

13 The fact that the government has not shown that it is entitled to summary judgment based on the subsection (f) presumption does not mean, as appellant contends, that Pent-R should have been granted summary judgment below. It would appear, however, that judgment for appellant would be appropriate with respect to these cases unless the government produces direct evidence of the actual dates of mailings.

and that certain of the evidence within those records was inadmissible hearsay. Pent-R claims, therefore, that this evidence was insufficient to support the granting of summary judgment for the government.

As a general proposition, administrative records may be a sufficient basis for the granting of a motion for summary judgment. See, e.g., *United States* v. *Lange*, 466 F.2d 1021, 1025 n. 5 (9th Cir. 1972); *Dredge Corp.* v. *Penny*, 338 F.2d 456, 460 (9th Cir. 1964). Pent-R claims, however, that the administrative records in the subject cases were inadmissible because they were certified, not by a custodian of records as required by Rule 44(a)(1), Fed.R.Civ.P.,[14] but by a postal official in Washington, D.C.[15] The district judge rejected this contention, principally because Pent-R had not argued that the administrative record produced was not in fact a true copy of the record. He also noted that Pent-R had been furnished copies of these documents in connection with the administrative proceedings, a statement disputed by Pent-R.

Whether or not Pent-R's contentions with respect to the requirements of Rule 44 are correct, we do not find that

---

14 Rule 44(a)(1) Fed.R.Civ.P., provides:

"(a) *Authentication.*

"(1) *Domestic.* An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or any entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office."

15 See Brief for Appellant at 20.

they require reversal in seven of these cases.[16] Rule 902 of the Federal Rules of Evidence, which would be applicable to these proceedings should we remand them,[17] has expanded the means by which official documents and copies thereof may be authenticated.[18] Rule 902(4) provides that copies of official records may be authenticated by certification of the custodian or *other person authorized* to make them, if the certification itself complies with other requirements set forth in the Rule. It is sufficient under subdivision (1), if the document bears a seal purporting to be that of a department or agency of the United States and a signature purporting to be an attestation or execution. The record reveals that these requirements were met with respect to the seven subject cases. As for the authority to

---

16 These seven cases bear docket numbers 74-2281, 75-6019, 75-6027—75-6031.

17 See Public Law 93-595; 88 Stat. 1926.

18 Rule 902, Fed. Rules of Evidence, provides in pertinent part:

"RULE 902. *Self-authentication*

"Extrinsic evidence of authority as a condition precedent to admissibility is not required with respect to the following:

"(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

• • •

"(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.

• • •

make the certification, it has been suggested that the authority of the signatory "should be assumed on the basis of his certification alone." See 5 Weinstein's Evidence ¶902(4)(01) at 902-21. In the interest of expediting the disposition of these cases, we note the admissibility of the administrative records under the new Rules of Evidence and decline to reverse on the basis asserted by appellant.

The record on appeal in the other cases does not show compliance with the requirements of Rule 902. Nor can we agree with the district judge that the fact that Pent-R received copies of the documents in question or failed to contest their legitimacy—even if true—makes the documents admissible in evidence. We remand these cases for consideration, *inter alia,* of whether the administrative record meets the requirements of Rule 902, Fed. Rules of Evidence, or Rule 44(a)(1), Fed.R.Civ.P.

However, Pent-R's claim that the certification in many cases fails to adequately describe the documents to which it applies need not be reexamined. We note that in each case the certification refers to the "annexed documents". In no case has Pent-R claimed, either here or below, that the documents admitted as part of the administrative record were not annexed to the certification. While it would be better practice in cases such as these to list the individual documents to which the certification is applicable, we cannot say that the failure to have done so rendered the documents submitted in these cases inadmissible in the district court or constitutes a basis for reversing the court's grant of summary judgment to the government in these cases.

Pent-R has also challenged the admissibility in the district court of envelopes which were in the administrative record and purported to contain entries made by the addressees indicating both the fact that a second mailing

had been received and the date of its receipt by the addressee. Pent-R argues that since these entries were made by third parties and not by Postal Service employees, the district court erred in finding them admissible as business records pursuant to 28 U.S.C. §1732(a).[19]

Appellant's point is not without merit. However, having considered it, we find that we are persuaded by the reasoning of the Ninth Circuit in *United States* v. *Lange,* supra, at 1024-25 and elect to follow that reasoning with respect to this issue in the context of this statute.

The manner by which these records came into the administrative files is an inherently reliable standard operating procedure. The letters are forwarded to the Postal Service by persons acting on their own initiative who have previously requested and obtained prohibitory orders. They are forwarded for the purpose of implementing the next step in a statutory scheme designed to provide a benefit to the addressee. Their submission to the Postal Service

---

19 28 U.S.C. §1732(a), since superceded by Rule 803(6) FRE, provided at the time of the district court decisions as follows:

"1732. *Record made in regular course of business; photographic copies*

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind."

by the addressee amounts to a demand upon the government that certain action be taken as required by law. And they contain notations which purport to be from the addressees and which are designed to furnish to the Postal Service the information needed for that body to determine whether or not a violation has occurred. Under all these circumstances, we find that in these cases the second mailing envelopes taken from the administrative files were properly found to be business records kept by the Postal Service and were admissible as such.

Having ruled on the admissibility of the evidence before the district judge, we turn now to Pent-R's alternative contention that, even if admissible, this evidence was insufficient in most cases to establish the government's right to summary judgment. In assessing a motion for summary judgment, one must distinguish between the moving party's initial burden, the type of showing which will meet that burden and shift it to the party opposing the motion, and the type of showing required of the party opposing the motion in order to defeat it.

Rule 56, Fed.R.Civ.P., requires that the moving party show, on the basis of admissible evidence adduced from persons with personal knowledge of the facts, that "there is no genuine issue as to any material fact." See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Cali* v. *Eastern Airlines, Inc.*, 442 F.2d 65, 71 (2d Cir. 1971). Where this initial showing is not made, summary judgment will be denied, even though the party opposing the motion has submitted no probative evidence to support its position or to establish that there is a genuine issue for trial. See *Adickes* v. *S.H. Kress & Co.*, *supra* at 159-60; Advisory Committee Note on 1963 Amendment to subdivision (e) of Rule 56. In other words, the party opposing the motion has the right to put the moving party

to its proof. If, however, the moving party does carry its preliminary burden, then, the opposing party may not defeat the motion by relying on the contentions of its pleading. Rather, it must produce "significant probative evidence tending to support [it position]." *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 289-90 (1968). See *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975).

In these cases, Pent-R did not submit evidence to the court below to counter the evidence contained in the administrative records. Rather, it relied on the contention that the evidence did not meet the government's burden on the motion. For a variety of reasons, the district court sustained the government's position with respect to each of these cases. We will examine each of the claims of error.

Pent-R claims that the administrative records were insufficient to establish that Pent-R received prohibitory orders on particular days because the return receipts submitted with the orders were inadequately identified with the particular orders to which they ostensibly referred. In this regard, we agree with the reasoning of the court below, set forth in a case which is not on appeal here, but which applies none-the-less. The court wrote:

> "In the absence of any suggestion that the Prohibitory Order was not in fact received, the absence from the administrative record of an explicit and self-evident cross-reference between receipt and Prohibitory Order is not of moment. The receipt is produced from official custody as the relevant receipt in association with the Prohibitory Order. Its date is appropriate the signature is not challenged, the presence of the Prohibitory Order in defendant's files is not denied. That there might be confusion in the Post Office files does

BEST COPY AVAILABLE

not support an inference that any particular receipt is in a false association." [20]

The records submitted were sufficient to require appellant to produce "probative evidence" that a particular prohibitory order was not received on the date shown by the record. It failed to do so.

Pent-R also contends that for a variety of reasons, several of which apply to a number of the cases on appeal, the administrative record failed to show that there was no genuine issue of material fact as to the receipt of the second mailing by the addressee at a time which would bring the §3008(f) presumption of a violative mailing into play. These contentions are addressed to the sufficiency of the notations on the second mailing envelopes to establish the point at issue and, with respect to several of these contentions, we agree with appellant that the grant of summary judgment was inappropriate.

In four of the cases,[21] the envelopes did not sufficiently establish the dates on which the mailings were received by the addressees, either because they contained no dates at all, or because the dates of receipt set forth on the envelopes were stated to be approximate, or because, although there was a date and what purported to be the signature of the addressee on the envelope, there was nothing on the envelope which indicated that the date shown was the date on which the addressee received the second mailing. See *United States* v. *Lange, supra* at 1026. However, where the envelope in question set forth the word "received" or some variant thereof followed by a date and what purports to be the signature or the initials of the addressee,

20 See Brief for Appellant at 43.

21 The four cases bear docket numbers 75-6016, 75-6018, 75-6020, 75-6025.

we find that the evidence was sufficient to carry the government's burden on the question of when the second mailing was received.[22] Since Pent-R submitted no evidence to contradict this showing, we affirm the district court's finding with respect to these cases that there was no genuine issue of fact as to the date of receipt by the addressees of the second mailing from Pent-R.

As to three of the cases,[23] we agree with Pent-R that the envelopes submitted do not establish who received the envelopes on the dates which appear thereon. For example, where the writing on the envelope simply states that it was received on a particular date, it is possible that this was the date on which it was received by the post office after having been returned by the addressee rather than the date on which the addressee received it from the sender. Thus, in these three cases, the government failed to show the absence of material fact regarding the date of receipt of the second mailing.

Finally, Pent-R claims that summary judgment was improperly granted with respect to a number of cases either because there were two different handwritings on the envelope, one of which indicated when it was received and one of which indicated who received it, or because the handwriting on the envelope failed to match what pur-

22 The cases in which the notations meet these requirements bear docket numbers 75-6014, 75-6015, 75-6021, 75-6024, 75-6027, 75-6031, 75-6032. We also affirm the district court's finding on this point with respect to 75-6028. Pent-R has presented nothing from which we can conclude that its contention that the administrative judge's finding as to when the second mailing was received was unsupported by the evidence. Likewise, we affirm the finding on this point with respect to 75-6030 where Pent-R's only complaint is that the date was supplied by a Mrs. E. R. Oetken, while the addressee was listed as E. R. Oetken. In fact, the administrative record indicates that it was Mrs. E. R. Oetken who requested the prohibitory order. See Appendix at 1629a.

23 The three cases bear docket numbers 74-2281, 75-6017 and 75-6031.

ported to be the handwriting of the addressee appearing elsewhere in the administrative record. In either case, Pent-R asserts that the discrepancy leaves an issue of fact as to whether or not the addressee received the second mailing on the date indicated or whether the date was entered later by some other person and had some other significance.

Where it is apparent that two handwriting specimens are from the same hand, the mere assertion they differ is not sufficient to raise a question of fact for trial. In most of the cases in which Pent-R has raised this claim, we have examined the record and we find that the district judge did not err in concluding that there was no genuine issue of fact with respect to this matter. In two cases, we sustain appellant's contention that the government failed to carry its initial burden of proof by failing to offer any explanation for what are apparently markedly different handwritings appearing in the record.[24]

The final objections which appellant raises to the judgments entered below deal with the adequacy of the administrative procedures used by the Postal Service in handling these cases before they were referred to the Attorney General and brought before the district court. In particular, appellant attacks the adequacy of the notice it received of the charges, the alleged denial of an appeal within the Postal Service as provided for by the applicable regulations,[25] and the ruling by the Postal Service that appellant had forfeited its right to an administrative hearing by failing to mail its request for a hearing in such a way that it was actually *received* by the appropri-

24 These cases bear docket numbers 75-6015 and 75-6031.

25 See 39 C.F.R. §916.12.

ate postal official within the fifteen days allowed for *filing* such a request.[26]

We have some doubt about the adequacy of the manner in which the administrative proceedings were handled in many of these cases. In particular, we agree with appellant that the Postal Service's interpretation of its regulations as requiring that requests for hearings be *received* within fifteen days allows for self-serving delay by the Service in delivering such requests through the mail. However, we find that the fact that the Postal Service required that requests for a hearing be *received,* as opposed to mailed, within fifteen days was harmless error in these particular cases.

Subsection (d) of the statutory scheme calls for a second hearing before the district court before a compliance order may be issue. As previously indicated, the Supreme Court has stated that the determinations to be made by the trial judge at this hearing are the same determinations which are to be made by the Postal Service official at the administrative hearing. See *Rowan* v. *Post Office Dept., supra* at 739 n. 6. We interpret this requirement to mean that the district court hearing is to be *de novo* and appellant is to be permitted to raise any issues which might have been raised at the administrative level. See *United States* v. *Lange, supra* at 1024, 1026; *Rowan* v. *Post Office,* 300 F.Supp. 1036, 1046 (Hufstedler, *J.*, concurring), *affirmed,* 397 U.S. 728. Accordingly, we find no ground for reversal in Pent-R's claims of administrative error in these cases.

We have examined appellant's other assignments of error and find them to be without merit. In accordance with the reasons set forth in this opinion, we affirm the

26 See Id. at §916.3.

judgment of the district court with respect to four of the cases before us[27] and reverse and remand with respect to the other cases[28] for further proceedings not inconsistent with this opinion.

27 The judgments are affirmed in the cases bearing docket numbers 75-6019, 75-6028—75-6030.

28 The judgments are reversed in the cases bearing docket numbers 74-2281, 75-6014—75-6018, 75-6020—75-6027, 75-6031—75-6033.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 579
(Mark)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 580, 72 C 582, 72 C 606 and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that de-

Memorandum and Order by Dooling, D. J.

fendant's allegedly timely mailed Request for Hearing was ignored. It was mailed to the Postmaster at Detroit, Michigan, from New York City, fourteen days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

69 C 1363
(Gladden)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.

Herbert Monte Levy, Esq., for defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606, and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was ignored. It was mailed to the Postmaster at Kansas

Memorandum and Order by Dooling, J.

City, Missouri, from New York City, fourteen days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 580
(Harter)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.

Herbert Monte Levy, Esq., for defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 72 C 609, 60 C 1290 and 72 C 588, and what has been said in those dockets need not be repeated here.

Particular to the present case is the narrow point that the certification of the administrative record is inadequate. There are two "certificates." One certifies that a sheaf of papers attached to it consists of true copies: the copies attached are the familiar round of first-mailing,

request for order, order, receipt for order, second mailing, Complaint, and receipt for complaint. A second, later-made certificate, certifies that the attached document is a true copy of a document in Post Office custody, and identifies it as a Postmaster's Order finding mailer in violation of the Prohibitory Order in "P. O. Docket R8-DM-57 (G. Harter)." Attached is a copy of such Order in the familiar printed form.

It is not suggested that the papers furnished under the "certificates" are not true copies, or that they do not correspond with defendant's own records, or that any paper relevant to the case is missing from the sheaf of papers as presented. The Post Office could indeed profit by using a form that adopted the scheme and the clear, complete and succinct language of Rule 44(a) (1). But its failure to have done so is not an answer to a motion for summary judgment. See 28 U.S.C. §1733(b); *cf. Wynne v. United States,* 1910, 217 U. S. 234, 246-247; *United States v. Merrick,* 10th Cir. 1972, 464 F. 2d 1087, 1092-1093.

It is, accordingly,

ORDERED that the plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied. A separate judgment form has been approved for the Clerk's entry.

Brooklyn, New York
July 24, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 581
(Walsh)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.

Herbert Monte Levy, Esq., for defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606 and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was

Memorandum and Order by Dooling, D. J.

ignored. It was mailed to the Postmaster at Newark, New Jersey, from New York City, fourteen days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 582
(Sellers)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.

Herbert Monte Levy, Esq., for defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was ignored. It was mailed to the Postmaster at Philadelphia, Pennsylvania, from New York City, a very few

Memorandum and Order by Dooling, D. J.

(if any) days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above except the objection that the second mailing was apparently "refused" and, therefore, could not have been found "pandering." Apart from the facts that "refused" does not mean "refused without opening and examining" and that the envelope signalled the content of the mailing the Prohibitory Order and the statute requires that there be no second mailing of any kind, whether "pandering" or not.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

JOHN J. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 584
(Carson)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606, and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was ignored. It was not mailed to the Postmaster at

Memorandum and Order by Dooling, D. J.

Houston, Texas, from New York City until fifteen days after the receipt of the complaint. In this case, moreover, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

JOHN J. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 586
(Griffis)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606, and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was ignored. It was mailed to the Postmaster at Columbia, South Carolina, from New York City fourteen

days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 587
(Messer)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606 and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was ignored. It was not, however, mailed to the Postmaster at Washington, D. C. from New York City until

fifteen days after the receipt of the complaint. In this case, moreover, remand would not be appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above except that the first and second mailings were both to the same address, whereas the Prohibitory Order forbade only mailings to the addressee's new address, advising defendant that the first mailing had been to the addressee's "former address." Since the second mailing was to the same addressee at a former address from which, it could be inferred, his mail would be forwarded, it was a violative mailing. Defendant was on notice of both addresses.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 26, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 588
(Metheny)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for defendant.

DOOLING, D. J.:

As in 69 C 1362, 72 C 609 and 69 C 1290, the plaintiff has moved for summary judgment on the administrative record and the defendant has cross-moved on affidavits for summary judgment in its favor. The administrative record taken with defendant's affidavits authorizes the following uncontroverted findings of fact:

Some time on or before May 26, 1969, James T. Metheny received from defendant its illustrated brochure advertising its photographic manual of sexual intercourse addressed to "James Methenie, Box 3057 Parkersburg, WV 26101." The addressee then executed a Notice for Prohibitory Order signing his name "James T. Metheny" and giving his street address as 2203 Beverly Street, Box 3057, Parkersburg, W. Va. 26101. Under date of May

29, 1969, the Post Office issued its Prohibitory Order referring to a mailing piece addressed to "James Methenie (Metheny) 2203 Beverly Street, Box 3057, Parkersburg, WV 26101" and ordered defendant to refrain from any further mailings to the undernamed party at the indicated address "or intended for the indicated address by any variation of addressee designation, such as . . . householder, resident, boxholder, postal patron, rural route boxholder, and local"; the name then given is James Methenie (Metheny), the address is given as "2203 Beverly Street, Box 3057" and the rest of the address is given as "Parkersburg, West Virginia 26101."

Defendant made a second mailing of the illustrated brochure addressed to J.T Metheny, BX 3057, Parkersburg, WV 26103. It was received by J.T. Metheny on July 14, 1969, as set forth on the cover of the envelope. Under date of August 6, 1969, a complaint was issued reciting the Prohibitory Order as one received by defendant on June 2, 1969; it charged that defendant had violated the Prohibitory Order by a further mailing adding, "See Exhibit attached hereto." Attached, apparently, to the complaint are reproductions of the cover of the envelope, of the enclosed address card (visible through the window of the cover envelope), and the advertising brochure. The administrative file includes a receipt signed by defendant which is stamped, under the space headed "DATE DELIVERED," "Aug. 8, 1969." Defendant has produced an envelope stamped with the same registry number that appears on the signed receipt. On the back of the envelope appears the Charleston, West Virginia post office stamp dated August 6, 1969, and two Brooklyn post office stamps, one for the Gravesend Station of August 7, 1969, and the second, somewhat obscured, but also dated August 7, 1969. On the envelope also appears an isolated rubber-stamp date in different colored ink "Aug. 26, 1969."

Under date of August 25, 1969, the post office mailed defendant an Order reciting that satisfactory evidence had been presented that defendant acted in violation of the Prohibitory Order and that the Attorney General was being requested to consider applying to a District Court for an order requiring compliance with the Prohibitory Order. Not, however, until September 3, 1969, did defendant mail a request for a hearing, through counsel, to the Postmaster. Under date of September 8, 1969, defendant appealed to the Assistant General Counsel, Mailability Division, Post Office Department, on the grounds that defendant had been denied a hearing notwithstanding that it had filed its application for a hearing within eight days after receiving the complaint.

1. The point that defendant makes with most force in connection with the Metheny case is the alleged failure of the post office to effect a timely delivery to defendant of the complaint. Plaintiff contends that the complaint was not received until August 26th and challenges the applicability to the mailing of that complaint of the receipt relied on by the government and incorporated in the administrative record. The only basis for the contention is the Goldman affidavit of November 2, 1973, which, as a reading of it demonstrates, is entirely speculative and wholly insufficient to overcome the self-evidence of the receipt over defendant's own signature and the date on it. This, coupled with the Post Office action in issuing the order of August 25, 1969, is indicative of the belief of the Post Office that it had a receipt upon which it could properly act, and more than overcomes the appearance of the date August 26, 1969, on the reverse of the envelope in which the complaint was delivered. The explanation of this stamped date is barren assertion. The defendant's affidavits show that the possibility of the existence of an individuated recollection by the responsible employees in defendant's service is nil in view of the very large number of mail transactions relating to Post

Office Prohibitory Orders and Complaints to which defendant was a party at the time in question. In the end it would be necessary to fall back on the administrative record, including the receipts for the mailings, and the inference to be drawn from these facts plus the presumption of regularity in transactions of an ordered sort in established organizations.

Turning to the Request for Hearing, the grounds assigned for objection to the issuance of a final Order determining violation are insufficient. The loss of the hearing and of the appellate rights are in this case wholly immaterial. The points raised in the Request for Hearing have all been passed on in the determinations made in this Court in 69 C 1362, 72 C 609 and 69 C 1290. The one factual point made, that only a copy of the Prohibitory Order was annexed to the Complaint, appears to be a plain mistake in the preparation of the request, and is, in any case, immaterial in the absence of a showing of resultant confusion, uncertainty or prejudice (see decision in 72 C 583).

2. It is objected that it was not proper to treat the second mailing as a violation because it was made to James Methenie. The objection is without merit. The Prohibitory Order gave both versions of the name, as noted above, and the second mailing was to the same person, using the second spelling. The mailing reached the same person, and it was not addressed to a name which should or could not have been anticipated as a form of the name which defendant might find in its mailing lists. The evidence of the administrative record is that in fact the second mailing was to the person to whom the defendant was directed to refrain from making further mailings. The objection on the ground of difference in names must be rejected.

3. It is, finally, objected that the second mailing was to a different zip code than the first and that the zip code used in the second mailing was not that contained in the

Prohibitory Order. The difficulty with the objection is again that the letter did not miscarry when it was delivered to "J.T. Metheny BX 3057, Parkersburg, WV." The mailing went to the same person, and the correspondences between the two addresses are such as altogether to eliminate the possibility that the person who received the second mailing was not the one to whom the defendant intended to send it.

It is no doubt true that defendant's methods of doing business made it difficult to avoid violation in this respect. Its computerized lists betray it on such occasions. But unfortunately defendant must be treated as though it had only a few short lists and a personal consciousness of all of its acts. Orders are directed to persons not to electronic devices. The complexity of defendant's business is not a defense against the claim of an individual addressee who has obtained an order directing defendant to make no further mailings to him; the statute is addressed not to facilitating defendant's business or imposing the least costly constraints upon it but to protecting the rights of individuals to be free of what they regard as an unwelcome intrusion.

It is, accordingly

ORDERED that the motion of the plaintiff for summary judgment is granted and the motion of the defendant for summary judgment is denied. A separate compliance order has been approved and will be entered by the Clerk.

Brooklyn, New York
July 24, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 598 (Featherston)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, United States Attorney, of Counsel) for plaintiff.

Herbert Monte Levy, Esq., for defendant

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606 and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was ignored. It was mailed to the Postmaster at New

Memorandum and Order by Dooling, D. J.

Orleans, Louisiana from New York City until fifteen days after the receipt of the complaint. In this case, moreover, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 26, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 599 (Costa)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for Defendant

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. All objections of defendant in this action were raised and disposed of in 69 C 1362, 72 C 606, and 72 C 609, and what has been said in those dockets need not be repeated here. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 600 (Kiyak)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for defendant

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606 and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was ignored. It was mailed to the Postmaster at Newark, New Jersey, from New York City, fourteen days

Memorandum and Order by Dooling, D. J.

after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 26, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 601 (Coffin)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.

Herbert Monte Levy, Esq., for defendant

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290 and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was ignored. It was mailed to the Postmaster at Newark, New Jersey, from New York City, thirteen days after the

Memorandum and Order by Dooling, D. J.

receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 26, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 603
(Day)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.

Herbert Monte Levy, Esq., for Defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. All objections of defendant in this action were raised and disposed of in 69 C 1362, 72 C 588, and 69 C 1290, and what has been said in those dockets need not be repeated here. Accordingly, it is

Memorandum and Order by Dooling, D. J.

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 606
(Molaison)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for Defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 72 C 609, 69 C 1290, and 72 C 588, and what has been said in those dockets need not be repeated here.

Particular to this case are two contentions:

The *first* is that a request for hearing was air mailed to New Orleans on October 3, 1969, the day before the deadline date computed by defendant, and was ignored as late. But defendant's computation requires rejection of the date

on the registered mail receipt (on the basis of the nugatory Goldman affidavit) and acceptance of the date that defendant says that it was its practice to stamp on registered mail envelopes when received. There is no basis for electing such a rejection in a case that does not (because of the multitude of featureless transactions involved) admit of helpful oral testimony from actual participants in the transactions. The receipt date is congruent with the Post Office date stamps on the envelope, and defendant's asserted date is not.

The *second* point is that the Prohibitory Order of April 14, 1969, had no name inserted in the name-space following the decretal language ("refrain from • • • *further* mailings to the following parties at the indicated address," underscoring supplied), but the order had inserted in that space only the address. If it were possible to say that the blunder could have misled the mailer, there would be much to the point, of course. But "H. J. Malaison," at the same address, is given above on the form as the person to whom defendant had mailed the first letter, and, hence, omission to insert the name below could not leave defendant in any doubt about the command of the Prohibitory Order with respect to *further* mailings.

It is, accordingly,

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross motion is denied. A separate form of judgment is approved for entry.

Brooklyn, New York
July 23, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, INC.,

Defendant.

72 C 610
(Oetken)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for Defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 72 C 606 and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing was ignored. It was mailed to the Postmaster at Portland, Oregon, from New York City not more than ten days after the receipt of the complaint. In this case, however,

remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above except the claim that the first mailing was "Refused" and, therefore, the addressee could not have formed the opinion that it was a pandering advertisement. Apart from the fact that the warning envelope itself may have been signal enough to the addressee, the word "Refused" does not imply that the envelope was not opened: on the contrary the more natural inference is that it was refused because it had been opened and had been examined.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 26, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 612
(Sample)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for Defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 72 C 583 and 69 C 1290, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

was ignored. It was mailed to the Postmaster at Houston, Texas, from New York City, fourteen days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 26, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

APPENDIX B.

Opinions of the District Court in Related Companion Cases.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

69 C 1362
(Ireland)

Appearances:

Lloyd H. Baker, Esq., (David G. Trager, Esq. United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for Defendant.

DOOLING, D. J.:

The Government moves for summary judgment requiring defendant to comply with Post Office Department Prohibitory Order No. 5776 issued pursuant to 39 U.S.C. §4009 on July 14, 1969. Plaintiff moved on the certified copy of the Post Office Department record without more.

The Government's case, based on the administrative record, is the following:

Defendant mailed from Brooklyn to one L. Ireland an advertisement for "The Photographic Manual of Sexual Intercourse." There was prominently printed on the envelope a statement as follows:

Memorandum and Order by Dooling, D. J.

"NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED," sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank you."

The recipient, L. Ireland, on a printed form supplied by the Post Office Department signed under date of March 8, 1969, a statement that the recipient considered the mailing "to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter" and requested that the mailer, Pent-R-Books, Inc., be directed "to refrain from making any further mailings to me." Having received notice that an addressee had received the kind of mail matter described in Section 4009(a) and a request for an order, the Newark, New Jersey Post Office sent to defendant at its address as given on the envelope addressed to L. Ireland a Prohibitory Order: the Order recited that the addressee had determined that the advertisement was a pandering advertisement etc. and had requested the issuance of an order under Section 4009; the Order, as provided in Section 4009(c), directed defendant (a) to refrain from any further mailings to L. Ireland at 3 Mill Street, Bloomfield, N. J. 07003, (b) immediately to delete L. Ireland from all the mailing lists that defendant owned or controlled, and (c) to abstain from selling, renting, exchanging or otherwise making transactions involving mailing lists bearing the name of L. Ireland. The administrative record shows that defendant admitted receiving the prohibitory order.

Memorandum and Order by Dooling, D. J.

More than thirty but less than sixty days after the date of the Prohibitory Order, defendant sent a further communication addressed to L. R. Ireland, 3 Mill Street, Bloomfield, N. J. 07003; the envelope bore a notice to the addressee like that of defendant's earlier mailing, asserting that the envelope contained an illustrated brochure offering a new marriage manual for sale. Under date of June 6, 1969, the Newark Post Office sent to defendant at its address as shown on the previous envelopes a complaint reciting the earlier Prohibitory Order and stating that evidence had been produced that the order had been violated (a) by further mailings to the addressee listed, (b) by failing immediately to delete the addressee's name from defendant's mailing lists, and (c) by selling, lending, exchanging or otherwise making transactions involving mailing lists bearing the addressee's name. The complaint stated that any response to the complaint or request for a hearing would have to be filed within 15 days after receipt of the complaint; the complaint recited that it enclosed a copy of the Department's Rules of Practice relative to answering the complaint and requesting a hearing. Defendant signed a receipt for the mailing.

Finally, under date of July 14, 1969, the Postmaster at Newark sent defendant a form entitled Order stating that satisfactory evidence had been presented that defendant had acted in violation of the Prohibitory Order and that the Attorney General was being requested to consider applying to a District Court for an order directing compliance with the Prohibitory Order. The present suit was filed on October 31, 1969.

The administrative record exhibits literal compliance with the mandate of the statute, the scheme of which has been unqualifiedly approved in *Rowan v. United States Post Office Department*, 1970, 397 U. S. 728.

Defendant's affidavits do not challenge any of the controlling facts reflected in the administrative record.

Memorandum and Order by Dooling, D. J.

1. Defendant argues first that this case and all similar cases pending in this Court* are moot because defendant never genuinely voluntarily committed a witting violation of the Prohibitory Order, but, at worst, was "guilty" of an unavoidable error due to the limitations of computer technology, and that in aggregate its erroneous mailings have been confined to a trifling number of incidents of seeming disobedience (when the number of such mailings is expressed as a percentage of its total mailings and total Prohibitory Orders) occurring despite systematic, expensive and well planned efforts to assure over-all compliance. In a word, the defendant argues that there should be no compliance order because there has been no willed disobedience and there is no threat of any future willed disobedience. Defendant asserts that its existing computer technology all but excludes the risk of future violation of the Prohibitory Orders of the Department.

Defendant misconceives the scheme of the law. Compliance Orders of court are not punitive but directory; they simply lay the groundwork for future contempt proceedings. Defendant's liability to subjection to individual Compliance Orders of court is the begetter of defendant's praiseworthy compliance effort, but that effort is not an answer to its liability to the entry of any

*Of the approximately 70 related cases involving Pent-R-Books pending before this Court, motions for summary judgment have been filed in the following 28 cases:

69 C 1290	72 C 583	72 C 598	72 C 606
69 C 1362	72 C 584	72 C 599	72 C 607
69 C 1363	72 C 585	72 C 600	72 C 608
72 C 579	72 C 586	72 C 601	72 C 609
72 C 580	72 C 587	72 C 602	72 C 610
72 C 581	72 C 588	72 C 603	72 C 611
72 C 582	72 C 597	72 C 604	72 C 612

They involve many of the issues passed on in the present docket, and the decisions in those dockets will incorporate by reference the applicable parts of this decision.

Memorandum and Order by Dooling, D. J.

individual Compliance Order. Proof of that effort is relevant to any future contempt case.

Plaintiff argues that *Hecht Company v. Bowles,* 1944, 321 U. S. 321, is authority for denying a Compliance Order here. In *Hecht* an injunction against the defendant's future violations of war time price ceilings was denied upon its demonstration that all earlier violations were promptly corrected when discovered and that vigorous steps were taken to prevent recurrence of violations; there was evidence of the difficulty of assuring compliance with price ceilings in the countless transactions of a very large department store. The denial of the injunction in *Hecht* did not mean that Hecht was not liable to refund the overcharge of each customer. The denial afforded *Hecht* at best temporary immunity from being held in contempt for future violations. So, in the present case, the specific relief to which each offended addressee is entitled at the Government's request is an order of court imposing on the mailer the specific duty, culpable disobedience of which will be punishable by contempt, to avoid future mailings. The Government does not seek to subject defendant. as a systematic violator of Prohibitory Orders, to a general injunction that will make it punishable for contempt if it violates any Post Office Prohibitory Order whether or not a specific Compliance Order of court has been awarded to the particular addressee receiving the offending mailing that is the basis of the con empt application.

The very long d lay in bringing the 1969 cases to judgment is not, as lefendant argues, a ground for dismissal for want of prosecution. The delay is in some considerable part the result of the protraction of negotiations between defendant and the Department which were not abandoned until just before the Government filed its first motion for summary judgment in these cases. The large number of cases continuingly filed against defend-

ant in this district, and the appropriately global approach that the parties have taken toward determining the measure of defendant's statutory responsibility, preclude any finding that there has been a want of prosecution.

In connection with the mootness argument, framed also as a "case or controversy" argument, defendant argues that the extravagant cost of its compliance efforts, and the radical abridgement in the volume of mailings which have resulted from the measures that it has had to take in order to comply with the statute, have so gravely constrained its right to communicate that the First Amendment argument, disposed of in *Rowan,* must be regarded as re-presented by the circumstances of the present case. The argument, however, was unanswerably disposed of in *Rowan* (397 U. S. at 740). The Court emphasized throughout its opinion that it was not dealing with the right to communicate but with the right of citizens to reject the intrusion of communication upon them. The Court said in *Rowan* (397 U. S. at 738):

> "We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has the right to press even 'good' ideas on an unwilling recipient."

It is further argued that, because the Government has allegedly sought compliance orders only in cases where the mailings were sexually oriented, it necessarily censored the mailings in violation of the First Amendment. Cf. *Lamont v. Postmaster General,* 1965, 381 U. S. 301, 306. The argument seems to be that the working practice of the Post Office has forfeited the protection of the *Rowan* case because censorship is implicit in the Post Office's confining its requests for judicial Compliance

Orders to cases in which sexually oriented advertisements had been mailed, and by its omitting to see such orders when the Post Office did not consider the material mailed either sexually provocative or erotically arousing (even though it had received notice from addressees that they considered, (*e. g.*), material mailed by American Civil Liberties Union and the Practicing Law Institute sexually provocative and arousing and even though Prohibitory Orders had been issued. It should be borne in mind that the Post Office must have a continuing concern to see that addressees do not use their statutory rights as a subterfuge for relieving their mail boxes of all "junk mail" however insusceptible it may be of defensible characterization as sexually provocative or arousing. But if there have been instances of individous selectivity in requesting the Attorney General to seek judicial Compliance Orders, it does not appear on defendant's showing that such episodes have occurred in circumstances or to an extent sufficient to support a claim that the administration of the statute has converted it into an instrument for Post Office censorship of mailings of sexually oriented advertisements.

2. The point defendant most strenuously argues is that the systematic and carefully planned manner in which it revised its entire mailing system in order to comply with the law and the consequent extremely low incidence of violative mailings amount to substantial compliance with the law and furnish a defense to individual complaints seeking individual court Compliance Orders. After pointing out that the publication circulated by defendant has been held not to be obscene but protected by the First Amendment, defendant shows that it has rejected the use of all mailing lists except those which have been computerized so that it can effectively eliminate violative mailings after the issuance of Prohibitory Orders. It asserts that the running cost of the computerized operation in 1969 was $62,068. It shows that it

made about ten million mailings in 1969, that it received 200,000 Prohibitory Orders, and that the Post Office sustained complaints of violation in only about 500 instances, or one-quarter of one percent of the Prohibitory Orders issued. Defendant says, without contradiction, that whenever a statutory Complaint is received from the Post Office the name of the complaining addressee is put through computer processing to eliminate from all lists; if a complaint is thereafter received, the name is once again put through computer processing so as to establish a second path for eliminating any further mailings to that addressee; if the case is later filed in Court, then the addressee's name is put through the computer processing system for a third time so as to increase the probability of total compliance.

The progressive refinement of procedures, defendant says, has resulted in a steady decrease in the number of administrative complaints of violation; there were only seven complaints in the first-half of 1972, none in the second-half, none in the first six months of 1973 and thereafter only three. Not all the complaints thus specified dealt with mailings for defendants; the complaints included mailings made by the defendant's mailing service for other enterprises. Taking the whole number of Prohibitory Orders at 248,500 the incidents of violations between January 1, 1972, and November 8, 1973, would not exceed four thousandths of one percent.

Defendant estimates—and this is necessarily an estimate—that in its efforts to assure compliance it has foregone the use of rented lists with a loss of access to perhaps as many as eight million persons. A rented list, defendant explains, may not be copied; but effective scanning to select and eliminate addressee names must be by optical scanner, and the computers in use on defendant's work can scan only material translated into symbol-form and stored on magnetic tapes; effective scanning of rented lists would require forbidden re-copying of the lists into symbols for storage on magnetic tape.

Finally, defendant points out, to avoid mailing in violation of the Post Office Prohibitory Orders by mailings made where there were slight variances (from list to list) in the complaining addressee's name (as in the present case where the second mailing was to a person with a middle initial not present in the first mailing), the defendant set up the scanning operation to eliminate from its mailings any one the first five letters of whose last name and whose address corresponded with that of the person who had obtained the Post Office Department Prohibitory Order. That technique was later carried even farther by eliminating mailing to all addressees having in common the first five letters of their last names, the first three digits of their street address and their zip codes. Defendant estimates that over all it has spent $300,000 to comply and has achieved 99 3/4% compliance.

The showing is impressive, but it furnishes no answer to the present proceeding. The sophistication and high cost of defendant's compliance effort index the magnitude of defendant's operation and the extent of its means. They do not nullify the lapses; no matter how unintended, although they certainly reduce both the rate of lapse and the number and probability of later-stage court compliants for Compliance Orders. When violations occur, they entitle the individual addressee to the issuance of a Post Office Complaint, and, in proper circumstances, to a Post Office request that the Attorney General apply for a judicial Compliance Order. The statute is concerned with the interest of the individual addressee and does not seek to regulate the business of the publisher of the advertisements.

Moreover, what defendant has shown, if relevant, has relevancy to any contempt proceedings that might be initiated if, following the entry of judicial Compliance Order, a further seemingly violative mailing occurs. At that point the material now presented could well be of-

fered in mitigation of the charged violation of the Compliance Order, or, conceivably, to avoid altogether a contempt adjudication.

3. In the present and in a number of other cases objection has been made to the administrative record on the ground that the certified record was not actually served with the United States Attorney's motion for summary judgment, or that the certifying officer used a short form of certification which failed, as Rule 44(a) (1) requires, to state that he has custody of the record, or that, probably having no seal of office, the certifying officer has not attested his certification by his seal of office. In three cases it is pointed out that the certifying officer certifies "the annexed documents" but then fails to fill out a list of the documents as part of the certification form as the form used indicates was intended.

Defendant does not say that the administrative record is not a true copy of the record; since every instrument in it was communicated by copy to the defendant during the administrative proceeding defendant would not have any difficulty in pointing out any defect in the administrative record presented by plaintiff. If it be true that the certified record recited in the Government's motion paper was not attached to the motion papers when served, that, as a matter of the normal courtesies between counsel, should simply have occasioned the defendant's drawing the slip to the attention of the United States Attorney. To raise it months later in a brief as an objection of substance to a motion for summary judgment is not possible. *Cf. United States (Austin) v. Western Electric Co.,* 9th Cir. 1964, 337 F. 2d 568, 574-575. Again, there is no suggestion that there was no adminisrative record or that the administrative record, belatedly produced, is not a true copy of the communications that constitute the record.

4. It is argued that the administrative record does not adequately show that the allegedly violative mailing was

received by the addressee and mailed by the defendant more than thirty days after the defendant's receipt of the Prohibitory Order.

The objection turns on sub-division (f) of the statute, which provides that receipt of mail matter thirty days or more after the "effective date of the" Prohibitory Order creates a rebuttable presumption that the mail was sent after the effective date. Defendant argues that there was no competent evidence that any violating letter was mailed or received on any particular date, and that, in such administrative hearings as were held, the defendant was given no opportunity to confront, examine or cross-examine the alleged addressee as to the date of receipt, since, as the Post Office pointed out and the regulation (39 C.P.R. §916.7) notes, there is no authority in such an administrative proceeding to issue subpoenas to coerce the attendance of the addressee or other witnesses. It is argued further that for the Post Office to move forward on a hearsay statement to it that the letter had been received after the effective date of the Order, and then to fail to afford the mailer any opportunity to controvert the addressee's reported assertion is to deny the defendant due process.

The most obvious defect in the set of arguments is that the defendant does not say that the second mailings were not made and does not deny that they were made after the effective date of the Prohibitory Order. Limitations of administrative procedure do make it impossible for the mailer to coerce the attendance of the addressee, but the Post Office and the mailer are in the same position; the mailer and addressee, like the Government, are free to solicit the evidence of the other parties. Moreover, and this is the dispositive fact, the defendant itself is the best source of responsible evidence about the date of mailing. If there were doubt about the date of the second mailing, the defendant could at once resolve it by the barest and simplest of date comparisons.

It may be that defendant's envelopes are not postmarked and so do not disclose mailing dates. It is evident from examination, however, that the defendant's mailed envelopes are metered or prepaid envelopes, that they originate with defendant, that they do not require cancellation by Post Office stamping, and that it would not be difficult for defendant, as one step in its scheme of compliance, to protect itself against imposition by dating its envelopes. That defendant's operation is so great in extent that it cannot prepare and maintain records of the dates of its various mailings is hardly a circumstance to be used at this time to dilute the efficacy of this very simple statute with its very simple procedures.

In extension of the same argument defendant urges that in a number of cases, including the present one, the administrative file fails to show in even the most informal manner that the second letter was received by the addressee more than sixty days after the entry of the Prohibitory Order. Thus in the present case the Prohibitory Order was dated March 21, 1969; the allegedly violative letter bears a notation that it was received by the addressee on May 6, 1969. Defendant argues that no inference of a violative mailing can be drawn since, where the only administrative-record evidence of the mailing date is the statutory presumption created by proof of the date of receipt, that receipt must be more than sixty days after the date of the Prohibitory Order.

The contention is based squarely on the literal language of sub-division (f).

Two sets of considerations dispose of the contention.

First. Defendant's literal reading of sub-division (f) produces an effect that defeats the obvious meaning and purpose of the sub-division. Sub-division (f) becomes clear and harmonizes with the statutory scheme only if it is read with the word "effective" struck out in the first occurrence of the expression "effective date" so that

the provision reads "Receipt of mail matter thirty days or more after the date of the order • • • shall create a rebuttable presumption that such mail was sent after [the] effective date" of the Prohibitory Order provided for by sub-division (b). The scheme of the statute is this: A mailing is complained of by notice from an addressee that it is of a kind that he does not wish to receive, and requests an order. The Post Office is obligated to issue a Prohibitory Order (sub-division [b]). In this case it was issued on March 20, 1969. The statute made the Prohibitory Order effective on the thirtieth calendar day after the addressee receives it. Every mailing to the addressee after that day violates the Prohibitory Order. It may readily be supposed that a time lapse of thirty days is provided to make compliance feasible, for large scale mailers might need time to locate and delete the name of the addressee from all their mailing lists. A second mailing on the thirty-first day is a violative mailing. If all that is shown is that the mailing was received by the addressee on the thirty-second day after the mailer's receipt of the Prohibitory Order, will proof of that receipt serve as *prima facie* evidence of a violative mailing? Defendant argues that it cannot so serve, that another thirty day period must elapse; a receipt cancelled at least sixty days after the date of the order can be *prima facie* evidence that the mailing occurred thirty days after the date of the order. The statute cannot be supposed to have intended to double the grace period except in the case where the Post Office has evidence of the date of mailing. The use of the thirty day presumption period in exact correspondence with the thirty day period that precedes the effective date of the Prohibitory Order is the key to the meaning. If the offending mailing is shown to have been received after the effective date of the Prohibitory Order, it is presumptively a violation. The presumption is rebuttable from the defendant's mailing

records. There is a semantic slip in the phrasing of subdivision (f), for the meaning of the statute is unmistakable. There is no merit-base for the argument that twice thirty days must be shown to have expired where the mailer has the evidence of the mailing date and the Post Office must rely on evidence of the date of receipt to establish the date of mailing.

Second. When the complaint is sent to a mailer he is reminded of the date of the Prohibitory Order and is supplied with a copy of the envelope in which the allegedly violative material was enclosed and is charged with violation by making that mailing. The defendant has the right to respond to the charge, to make an issue on the point, and at that juncture to come forward with evidence of mailing. It is not claimed that any accused mailing occurred before the effective date of the Prohibitory Order. If the defendant had wished to make that point, the administrative hearing furnished the occasion to do so. In the absence of affirmative evidence that the mailing was made before the effective date, the point is lost in this Court in the failure to raise it in the administrative proceeding in an easy, effective and satisfactory way.

5. It is claimed on the basis of a card found in the Government's files during the course of an administrative proceeding in another matter that the Government in one or in some or in all cases had used a prepared typewritten or mimeographed form which explained to the complaining addressee that in order to make a case against the mailer the Post Office had to have a signed statement as to the date of delivery of the second letter. The form continued: "The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary." Then follows in the form a request that the addressee sign and return "this statement" and there is appended a statement in

which evidently the Post Office had filled in the date. The example located in the Post Office file, it is suggested, was typical—

> "ON AUGUST 27, 1969, I, THELMA MOSER, RECEIVED FROM THE PEN R BOOKS a second letter.
>
> Thelma Moser [in handwriting]
> signature"

Defendant argues that this was grossly improper procedure and should forfeit the Government's right to proceed in these cases. The argument falls of its own weight. If there was no second mailing the Government could hardly supply the form to the addressee and expect it to be signed and returned and to be supported by the accusatory second-mailing envelope. Hence, the only circumstances in which the card could be used would be those in which the addressee received a second mailing, made a complaint, and then was advised of the evidence needed to make out a right to have proceedings for a Compliance Order initiated. The explanatory material on the statement is correct; the suggestion of date, which the addressee is warned is an estimated date, is plainly related to the date of the addressee's complaint to the Post Office. No suspicion attaches to the use of the form, and it is now a foundation for any objection to the Government proceedings.

6. Defendant draws attention to the fact that under the statute as originally enacted, and before the general re-writing of the Postal title in connection with the change in the structure of the post office, Section 4009 (now Section 3008 of Title 39) provided that the Postmaster General should make the Prohibitory Order, serve the complaint in case of violation and then make the determination that the Prohibitory Order had been violated. It is argued that the Attorney General did not make any

determinations in the present cases. It is argued first that the printed form then in use, and perhaps still in use, does not use the statutory word "determine" at all. Instead of saying that it has been "determined" that you or your agents or assigns acted in violation of the above-captioned Prohibitory Order the form used says only

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order," etc.

The failure to use the word of the statute is immaterial. The determination is, of course, implicit in the issuance of the Post Office order, and the assertion that it is based on satisfactory evidence hardly weakens the effect of the determination.

The second branch of the argument is that there is no showing of a delegation of the statutory authority, if it is delegable, to any other functionary in the Post Office. However, 39 U.S.C. §309 at the times here involved provided:

> "The Postmaster General may delegate to any officer, employee, or agency of the Department such of the functions vested by law in him or in any other officer or employee of the Department as he deems appropriate."

The statute requires no particular formality of delegation. 39 C.F.R. §§ 812.1-812.4 outlines the modes of delegation, which are inclusive and detailed. The regulations establishing rules of practice for proceedings under §4009 reflect one specific aspect of the delegations. 39 C.F.R. §916.3 refers to respondents who have been served with "a complaint by the postmaster," and, elsewhere, the practice regulations assumes that an officer normally acting for the Postmaster General will be a postmaster.

Since there is a plenary power of delegation in the Postmaster General (and it is preserved in the law as

revised and appears as Section 402), in the absence of some indication of a ground to infer that there has been irregularity in delegation procedure it is correct to assume regularity in official procedures and that the delegations exhibited in the cases before the Court were proper.

Defendant's central point appears to be that Section 4009 must be read to require an actual determination by the Postmaster General himself. That would appear not to be the case in view of the presence of the delegation section in the statute and in view of the sheer physical magnitude of the task of signing orders, serving complaints and making determinations of violations under the statute. The staggering number of statutory incidents in defendant's own case demonstrates that to treat the statute as imposing a personal responsibility on the Postmaster is unthinkable. The section must be given the normal interpretation, that is, that either the Postmaster General or a delegate may exercise the authority.

7. Defendant asserts that the Complaint form used by the Post Office is inadequate since it does not give the date of the violative mailing and does not allege that the mailing was more than thirty days after the alleged receipt of the Post Office Prohibitory Order. The form used recites the date of receipt of the Prohibitory Order, and then asserts that evidence has been produced that the order has been violated by further mailings to the addressee listed in the order and that the mailer had failed to delete the addressee's name from mailing lists owned or controlled by the addressee. Attached to the complaint and referred to in it by the words "See Exhibit attached hereto," is a reproduction of the envelope that contained the matter complained of. The form then states that a response must be filed within fifteen days and encloses a copy of the Rules of Practice relevant to answering and requesting a hearing. (In some instances the complaint form is not, probably, wholly correctly used; the Department appears to have failed to strike out parts

of the printed complaint form that seem to be inapplicable to the particular incident.)

The complaint practice is adequate to the occasion. The complaint need not be one that could withstand scrutiny in an exacting court enforcing the common law rules of pleading. It need only fairly initiate the kind of proceeding contemplated by Section 4009 and its successor Section 3008. The simplicity of the issue presented by the circumstances is such and the consequence of administrative action so far removed from the imposition of any immediate sanction that elaboration of procedure is wisely avoided. The only consequence of a finding that there has been a violative mailing is to authorize the Post Office to ask the Attorney General to apply to the District Court for an order directing compliance with the original Prohibitory Order. (Sub-division (d) says that the Post Office is authorized to ask the Attorney General to apply "for an order directing compliance with such notice" but it manifestly means "for an order directing compliance with the order given under this section.") The Court in turn then must scrutinize the papers to determine whether an order is proper, and only then is the defendant exposed to the risk that another violation might result in punishment for contempt if the violation cannot be satisfactorily explained away.

8. Defendant argues that the Post Office procedure as invariably conducted (at least in defendant's experience) violates due process because it does not provide for a traditional adjudicatory proceeding in which there is an independent judge, the production of witnesses to establish the violation with full opportunity to cross-examine those witnesses and an opportunity to meet the issue in a fully adversary manner. Defendant suggests that as the procedure has worked out it does not accord the mailer the "administrative hearing" or "full hearing" referred to in *Rowan,* 397 U. S. at 738-739. The contention is without substance. The Court in *Rowan* noted that the statute specifically excluded the pre-complaint hearing

from the provisions of the administrative procedure act; the Court noted that the adoption of the hearing regulations, 39 C.F.R. §916.1 *et seq.*, had nevertheless taken place, intimating the Court's belief that even the elaboration of procedure provided by the regulations was unnecessary. Again the Court said (397 U. S. at 738-739), in discussing the due process argument, that at the addressee's request "• • • the Postmaster General shall issue a prohibitory order to the sender • • •. Only if the sender violates the terms of the order is the Postmaster General authorized to serve a complaint • • •. The sender can then secure an administrative hearing. The sender may question whether the initial material mailed • • • was an advertisement and whether he sent any subsequent mailings. If the Postmaster General thereafter determines that the prohibitory order has been violated, he is authorized to request the Attorney General to make application in a • • • District Court for a compliance order • • •" (footnote references omitted). Thus, in discussing the statute the Court plainly noted that the Postmaster General would be counsel, prosecutor and judge. The Court then noted (397 U. S. at 739) that since the whole administrative procedure involves no immediate sanction for a non-compliance with a Post Office Prohibitory Order, it could not be said that the administrative aspect of the statutory procedure denied due process. The Court added (397 U. S. at 739)

> "It is sufficient that all available defenses, such as proof that no mail was sent, may be presented to a competent tribunal before a contempt finding can be made."

9. Finally it is argued that in the present case (and in twelve other cases) there was a lack of geographical jurisdiction in the Post Office issuing the Prohibitory Order. Defendant's contention is that the Prohibitory Order must issue out of the City to which the first mailing was made. In the present case, the Prohibitory Order

Memorandum and Order by Dooling, D. J.

was issued in the name of the Postmaster of the Post Office at Newark, New Jersey, through the Director of Administrative Services. The accused letter was addressed to the complaining addressee in Bloomfield, New Jersey, 07003, and the area from which the letter was mailed was Brooklyn (11223).

So far as concerns this case: Bloomfield is somewhat less than five miles from Newark; there is no indication that it is not within the administrative district of the Newark Post Office. Apart from that, there is no venue or jurisdictional requirement in the statute. No doubt in normal course the Post Office to which the addressee sends or delivers any notice will be the one which issues the Prohibitory Order of any later complaint and request to the Attorney General, but that appears to be entirely a matter of human convenience and not at all a matter of jurisdiction or power.

It follows from what has been said that the Government is entitled to summary judgment. It is, accordingly,

ORDERED that the motion of the Government for summary judgment is granted and the cross-motion of the defendant for summary judgment is denied. A form of final judgment incorporating the compliance provision contemplated by the statute will be submitted by the Government on five days notice of settlement to the defendant within ten days after the date of the present Memorandum and Order.

Brooklyn, New York
July 3, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Supplemental Memorandum and Order by Dooling, J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

69 C 1362
(Ireland)

Defendant correctly points out that the Prohibitory Order was stamped with the issue date March 20, 1969. That is, it is agreed, the date to use at page 1 of the Memorandum and Order of July 3, 1974, filed July 8, 1974, rather than July 14, 1969, which is the date of the self-styled "Order" notifying defendant that the Postal Service is requesting the Attorney General to consider applying to a District Court for an Order directing compliance with the Prohibitory Order. The date has been changed on page 1 of the Memorandum and Order, and at line 1 of page 18.

Defendant correctly says that the envelope of the alleged mailing has a simple notation in unidentified handwriting that the envelope was received 5/6/69 without indicating by whom or at what place. Page 18, line 2, has, accordingly, been corrected by deleting the words "by the addressee."

Supplemental Memorandum and Order by Dooling, J.

To avoid confusion, at page 20 in the second line of the paragraph commencing *"Second,"* the words "receipt of the" are inserted before "Prohibitory Order." That is the language of the "Complaint," which recites the date March 21, 1969, as the receipt date.

The changes made have been initialled in the left margin of the pages on which they occur, and the Memorandum and Order of July 3, 8, 1974 is amended accordingly.

The letter of defendant's counsel of July 13, 1974, and its enclosure, will be docketed and filed as part of the record.

The arguments on the issues made in the July 13 letter are not agreed to and the decision will not be otherwise changed.

It is so ORDERED.

Brooklyn, New York
July 16, 1974.

JOHN F. DOOLING, JR.
U.S.D.J.

Memorandum and Order by Dooling, J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 583
(Byrnes)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.

Herbert Monte Levy, Esq., for Defendant.

DOOLING, D. J.:

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. §3008 (formerly §4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 72 C 609, 69 C 1290 and 72 C 588, and what has been said in those dockets need not be repeated here.

In this case, in which the second mailing was made more than 30 but less than 60 days after the Prohibitory Order was issued (see decision in 69 C 1362), defendant objects, *inter alia,* that the certification is of "POD

Docket G.C. No. 7260" whereas in fact the case involved is "P.O. Docket No. CIN-435." However, the papers attached to the certificate form are the papers of the complete CIN-435 docket, and it is not claimed that the copies supplied are false, or that the mailings were not made.

Defendant objects further that no copies of the second mailing were annexed to the complaint sent to it. The administrative record indicates the contrary, but if defendant is correct, that defendant was not fatal to the proceeding. Annexing a copy of the second mailing is contemplated by the standard printed form of complaint and it obviously is a convenience to the mailer and must speed up the process. But omission of the second mailing exhibit was not an administrative finality but a manifestly inadvertent omission. The Post Office was not required to proffer its evidence with its charge, although to do so would evidently expedite the matter. See 39 C.F.R. §916.4 (b). The complaint without the exhibit is abrupt and uninformative, but it is simply initiatory process, and it is scarcely more stark than the official complaint forms provided in the Rules of Civil Procedure. See Forms 4-9, 11, and 16.

Defendant has objected that the Post Office ignored defendant's timely mailed request for hearing (see decisions in 69 C 1290 and 72 C 609), and the Postmaster in response to defendant's objection stated by a letter to defendant of July 25, 1969, that the files disclosed no record of the receipt of a request for hearing. The final "Order" had been issued on July 7, 1969. A letter in the administrative file indicates that not until some time on or after July 15, 1969, had the Postmaster learned the date of the second mailing from the recipient Byrnes.

Since it cannot be accepted that a failure of the Post Office to deliver to itself a correct addressed and timely and duly posted request for hearing can deprive a person of a right to a Post Office hearing on a Post Office matter, it was not enough for the Post Office to rely on its non-receipt of a hearing request. Defendant was entitled to an administrative determination of the issue of due and timely mailing of a request for hearing.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted to the extent only of remanding the matter to the Postal Service for an administrative determination as to whether defendant was entitled to a hearing, and if it was, to accord defendant such hearing.

Brooklyn, New York
July 24, 1974.

JOHN F. DOOLING
U.S.D.J.

Memorandum and Order by Dooling, D. J.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

PENT-R-BOOKS, Inc.,

Defendant.

72 C 609
(Hull)

Appearances:

Lloyd H. Baker, Esq. (David G. Trager, Esq., United States Attorney, of Counsel) for Plaintiff.
Herbert Monte Levy, Esq., for Defendant.

DOOLING, D. J.:

As in 69 C 1362, the Government moves for judgment on the administrative record and the defendant cross-moves for summary judgment on affidavits.

The administrative record authorizes the following findings of fact:

Some time before May 5, 1969, defendant mailed to "Mr. Dick Hull, 902 Sparks St., Twin Falls, Id. 83301" what is described on the envelope as an "UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only a new marriage manual. . . ." Mr. Dick Hull was, according to his father's later assertion to the Post Office, sixteen years old. The Post Office received over the signature of Mr. Dick Hull a printed form of statement dated May 5, 1969, that he considered the "mailing to

be a pandering advertisement" etc., in the statutory language and requested that the mailer (Pent-R-Books) be directed to refrain from making any further mailings to him. Under date of May 23, 1969, the Acting Postmaster, Portland, Oregon, sent a Prohibitory Order to defendant in the standard printed form ordering it to refrain from further mailings to "Mr. Dick Hull . . . 902 Sparks Street . . . Twin Falls . . . Idaho . . . 83301."

It is not denied that defendant received the Prohibitory Order, but it is pointed out that the return receipt signed by defendant and dated May 27, 1969, is not shown by the Administrative record, as supplied to the Court by the Post Office, to be the return receipt related to the Hull Prohibitory Order.

A second mailing of the same kind of advertisement was made by defendant to "Mr. Dick Hull, 902 Sparks Street, Twin Falls, Id. 83301." Mr. Dick Hull's father, Mr. John F. Hull, turned the mailing over to the Post Office and signed a "Notice for Prohibitory Order" asserting that as parent of the minor addressee he considered the mailing a pandering advertisement etc. in the statutory language, and he requested that the mailer be directed to refrain from further "mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday]." Dick Hull was listed with a birth date of January 5, 1953. Mr. John Hull stated to the Post Office in writing that the second mailing was received on September 30, 1969.

A Complaint (not a second Prohibitory Order) was mailed to defendant under date of October 23, 1969, and defendant receipted for it on October 28, 1969. The complaint advised that any request for hearing "must be filed in the Office of the undersigned Postmaster within fifteen (15) days after receipt of this Complaint."

Defendant asserts, without contradiction, that it requested a hearing by counsel's communication dated and mailed November 6, 1969. The request was correctly addressed, and it gave the Post Office docket number correctly, as well as the last name of the addressee.

The administrative record does not disclose receipt of any notice of hearing by the Post Office, nor does it appear from the record that any hearing was granted.

Under date of December 22, 1969, the Post Office issued its "Order" to the effect that, satisfactory evidence having been presented that defendant acted in violation of the Prohibitory Order, the Attorney General was being requested to give consideration to applying to a District Court for an Order directing compliance with the Prohibitory Order. The present action, filed May 9, 1972, followed.

Defendant asserts, without contradiction that the Post Office advised him in the Hull case (and in other cases) that he was not accorded a hearing because the Post Office had not received defendant's request within fifteen days after defendant received the Complaint.

1. Defendant contends that Dick Hull, as a minor, could not effectively request a Prohibitory Order. On that basis, defendant asserts that the proceeding must be dismissed as based on an invalid Prohibitory Order.

The statute does not in terms deny to minors the right to make their own decisions about the mailings they are willing to receive. They may be supposed to form a class likely to be embarrassed in their family relations by the receipt of such mailings and able to profit by using such a statutory right. No contrary inference is to be drawn from the fact that parent-addressees may, under subdivision (g), request extension of any Prohibitory Order to

which they may themselves be entitled to include their children under age nineteen who reside with the parent-addressees.

2. It will be evident that Mr. Dick Hull is now over nineteen; he is, indeed, over twenty-one. Defendant contends that where a Prohibitory Order is obtained by a parent-addresee and it includes restraint on mailings to children under age nineteen who reside with the parent-addressee, the Prohibitory Order should be considered as expiring as to the child when the child becomes nineteen. For that reason a Compliance Order, it is argued, should not be made in this case. That would seem the plain implication of the statute. Oddly, however, the statute does not provide that, if the offending first mailing is addressed directly to the child, the parents with whom the child resides may request a Prohibitory Order. It provides rather, in subsection (g), that, upon the request of an "addressee," the Prohibitory Order may include a restraint on mailings to named children under nineteen residing with the addressee. The Senate Report (SR 801, 90th Cong., 1st Sess., U.S. Code Congressional and Administrative News, Vol. 2, pp. 2258, 2295) comments that the addressee is the sole judge of the "pandering" element, and whether he desires to receipt any further mailings from the sender "either addressed to him or to any minor child of his under the age of 19 years who resides with him." Possibly by inadvertence the statute does not enable the parent to determine the issue for the child where the child is himself the addressee. The Post Office forms simply assume that the parent can act for the addressee child as well as on the parents' behalf.

In the present case, as noted, the child was the addressee and the child himself obtained the Prohibitory Order. The second mailing was again to the child. Under a literal reading of the statute the boy's father was not entitled to request the issuance of a Prohibitory Order

(which, technically, he did request), since he was not the addressee. However, there is no reason to suppose that a parent may not in such matters act for the child as part of the general discharge of parental responsibilities until, at least, the child reaches an age at which its individual rights to act for itself in matters of conscience are thought to become of paramount importance.

But so far as the second mailing was concerned, the statute authorizes the Post Office to act when it believes, on the basis of information received from any source, that there has been a second mailing. So, in the present case, the Post Office acted within its statutory authority in issuing the Complaint. Since the minor was himself the one who requested the Prohibitory Order, his coming of age is immaterial.

3. In the absence of any suggestion that the Prohibitory Order was not in fact received, the absence from the administrative record of an explicit and self-evident cross reference between receipt and Prohibitory Order is not of moment. The receipt is produced from official custody as the relevant receipt in association with the Prohibitory Order. Its date is appropriate, the signature is not challenged, the presence of the Prohibitory Order in defendant's files is not denied. That there might be confusion in the Post Office files does not support an inference that any particular receipt is in a false association.

In the particular case, the Hull case, defendant's request for hearing removes the issue from debate. That request does not assert non-receipt of the Prohibitory Order as a ground of objection to the Complaint of violation. (Contrast the situation in 72 C 584.)

4. The administrative record supports only one inference, that defendant received the Complaint not earlier

than October 28, 1969. It mailed its hearing request on November 6, 1969, which would appear to allow ample time for it to have reached Portland, Oregon by the filing due date of November 12, 1969.

The Post Office can insist on literal compliance with statute; it speaks of filing within 15 days from the date of receipt of the Complaint. There appears to be no counterpart in the postal laws to 26 U.S.C. §7502 (treating the mailing date as the filing date for tax returns, payments, etc.). *Cf. Real Estate Corp.* v. *Commisisoner,* 10th Cir. 1962, 301 F.2d 422, 428. But there seems practical reason to conclude at minimum that a mailing in good season for delivery on or before the filing dead-line must satisfy the filing requirement. In the present case a mailing on November 6, 1969, if it took place on that date, would appear to be timely.* *Cf. Max Kralstein,* 1962, 38 T.C. 810, 819-820 (implying that a demonstration by the Commissioner of late receipt of a timely mailing would precipitate liability). And it is additionally noted that it is most appropriate to apply such a rule where the Post Office itself is the party both requiring the filing and charged with the duty to deliver the letter containing the hearing request to the interested postmaster.

It must, therefore, be concluded that the Post Office was not at liberty to ignore the request for hearing. If the notice was received on a date that appeared late to the Post Office, it should have so stated of record, affording defendant an opportunity to explain the apparent lateness in filing. It is not to be inferred that the 15 day requirement of the statute is mandatory and the filing a "jurisdictional" requirement. The statutory language is not peremptory in structure or in word choice.

*Apparently the Complaint was not more than five days in transit and the Prohibitory Order four days in transit.

Memorandum and Order by Dooling, D. J.

5. Defendant argues the bolder proposition that a mailing on the fifteenth day ought to suffice since it is in one sense a delivery of the hearing request to the Postal Service (or the Postmaster General under the earlier statutory language). The language of the statute might conceivably bear such an interpretation, but the regulations from the first (April 19, 1968, 33 F.R. 6013, 39 C.F.R. §916.3*) and now (39 C.F.R. 916.3) plainly require filing with the postmaster issuing the complaint, and the Complaint form fairly warns the mailer of that requirement. Such regulations not only interpret the statute and are entitled to respect as interpretation but also implement it, if its meaning is doubtful, in a lawful manner. See 39 U.S.C. §501(1).

Other points argued for defendant were disposed of in 69 C 1362 (Ireland).

Accordingly, it is

ORDERED that the motion of plaintiff for summary judgment is denied and the motion of defendant for summary judgment is granted to the extent only that the matter is remanded to the Postal Service for the purpose of determining whether defendant mailed a request for hearing at such time that it would in ordinary course of post have been received by the Postmaster at Portland, Oregon, on or before November 12, 1969, and, if so, to accord defendant a statutory hearing.

Brooklyn, New York
July 23, 1974.

JOHN F. DOOLING
U.S.D.J.

---

*The advance copy of the regulations and forms circulated by the Post Office (POD Publication 124 of April 1968) numbered the regulations §956.1 *et seq.*

Supreme Court, U. S.
FILED
FEB 11 1977
MICHAEL RODAK, JR., CLERK

No. 76-747

In the Supreme Court of the United States

OCTOBER TERM, 1976

PENT-R-BOOKS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-747

PENT-R-BOOKS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 538 F. 2d 519. The opinions of the district court (Pet. App. 27a-62a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1976. A petition for rehearing was denied on August 3, 1976. On October 26, 1976, Mr. Justice Marshall extended the time to file a petition for a writ of certiorari to and including November 30, 1976, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c), but would more properly rest upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a promise by a defendant not to repeat the offending conduct renders a case moot.

2. Whether the Pandering Law violates the First Amendment or should not be enforced in this case.

STATEMENT

This case arises out of petitioner's violations of 39 U.S.C. 3008 (the "Pandering Law"), which provides that recipients of "sexually provocative" mail may request the Postal Service to direct the sender to delete the addressees' names from all mailing lists, or be liable for contempt of court in the event of a subsequent mailing to these persons. Petitioner, which concededly made such second mailings, advances certain statutory and constitutional claims regarding its ultimate liability to a contempt order.[1]

In 1968-1969 petitioner mailed approximately 10,000,000 advertisements for "The Photographic Manual of Sexual Intercourse." Protests by addressees led to the issuance of 248,500 postal prohibitory orders (Pet. 13). The Postal Service subsequently found that the prohibitory orders had been violated by at least 500 subsequent mailings to the same addressees (*ibid.*). It sought compliance orders from the district court to prevent further mailings to the named addressees.

Over petitioner's objections, the district court issued the compliance orders (Pet. App. 27a-62a).[2] The court of appeals held that the district court had authority to enter compliance orders in this case, and it sustained the issuance of several particular orders (Pet. App. 5a-12a). It concluded,

[1]No such order has yet been issued.

[2]The district court's governing decision on the questions at issue here, issued in a case that was not before the court of appeals, is set forth at Pet. App. 63a-82a. This litigation concerns 20 consolidated actions seeking compliance orders. An additional 341 cases are pending in which compliance orders are contemplated; these have been held in abeyance until the issues in this case are settled (Pet. 11-12).

however, that some of the individual orders had been improperly issued, and it reversed them (*id.* at 12a-26a).

ARGUMENT

The Pandering Law "provides a procedure whereby any householder may insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative'." *Rowan* v. *Post Office Department*, 397 U.S. 728, 729-730. Under the Pandering Law, the Postmaster General, upon the request of an addressee, orders the sender (by "prohibitory order") to refrain from further mailings and to delete the addressee's name from the sender's mailing lists (39 U.S.C. 3008(b) and (c)), and if, after an opportunity for a hearing, the Postmaster General determines that the sender has violated the prohibitory order, he may request the Attorney General to obtain an order from the district court directing compliance (39 U.S.C. 3008(d)); this compliance order is enforceable by a contempt sanction.[3]

1. Petitioner argues (Pet. 17-19) that this case is moot because there is no reasonable likelihood of further mailings in violation of the prohibitory orders issued against it. Although petitioner concedes (Pet. 13) that it has already made repetitious mailings to the complaining addressees, thus rendering it liable to compliance orders, it argues that its new computer system renders a further wrongful mailing improbable.

[3]In order to be liable to contempt, therefore, a sender must have mailed objectionable material to the same addressee on three occasions. There must be a mailing to which the addressee objects, giving rise to a prohibitory order, a second mailing violating that order and leading to a compliance order, and a third mailing violating the district court's compliance order.

This argument is unpersuasive. Promises not to violate a statute in the future do not make a case moot, where past violations have been established. *United States* v. *W. T. Grant Co.*, 345 U.S. 629. A compliance order may properly be issued whenever there is a second mailing to the complaining addressee. As the court of appeals stated (Pet. App. 7a), "[t]here is no suggestion in the statute that either the Postal Service or the district court must determine that there is danger of yet a further violation of a prohibitory order before a compliance order may be issued." The addressees are not obliged to depend upon petitioner's assertion that it has a foolproof computer system; they may properly claim the protection of the district court's compliance order when, as here, undisputed violations of the Pandering Law have occurred.[4]

2. Petitioner's additional statutory and constitutional objections to the decision of the court of appeals have been definitively answered by this Court in *Rowan*, which considered and rejected analogous challenges to the Pandering Law.

Petitioner contends (Pet. 23) that deletion of the addressees' names from mailing lists is unconstitutional, because the statutory objective of shielding addressees from unwanted and offensive mail may be attained by less drastic means; petitioner maintains that the addressees may refuse

[4]For the same reasons, the issuance of the compliance orders was not an abuse of the district court's discretion. Petitioner asserts that no further improvements can be made to its computer system and that, therefore, an injunction serves no purpose. But petitioner's "liability to subjection to individual Compliance Orders of [the] court is the begetter of [its] praiseworthy compliance effort" (Pet. App. 7a). Moreover, it is not an abuse of discretion to issue a compliance order when, as here, the order "carries no penalty with it" (*ibid.*); if petitioner is correct that its system is foolproof, there will be [illegible] subsequent citation for contempt of the compliance

the mail at the time of delivery, or mark it "Refused" and return it to the sender. *Rowan* rejected this argument, holding that "the citizen cannot be put to the burden of determining on repeated occasions whether the offending mailer has altered its material so as to make it acceptable [nor] should the householder have to risk that offensive material come into the hands of his children before it can be stopped." 397 U.S. at 738.

Petitioner asks (Pet. 21) this Court to re-examine *Rowan*; it maintains that mailers cannot comply with the statute unless they refrain from mailing sexually oriented matter to large numbers of uncomplaining persons with names similar to those of the complainants.[5] This is not an inevitable result of compliance, although petitioner apparently has determined that it can make its computer system more thorough by using this method when sending advertisements to names obtained from rented mailing lists. But however that may be, the difficulties and consequences of compliance with the statute do not show that it is unconstitutional; to the contrary, petitioner's precautionary "practice of eliminating these names has played no small part in bringing about [petitioner's] present excellent compliance record" (Pet. App. 9a). To relax the statute, as petitioner requests, would result in a breach of the "wall" that Congress has allowed each person to erect between

[5]Petitioner also maintains that *Rowan* has been undermined by later cases, such as *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205. This is incorrect. In *Erznoznik* municipal officials forbade all outdoor screenings of sexually oriented movies, thereby shielding the sensibilities of the few at the expense of the many. The Pandering Law, by contrast, allows mailings of sexually oriented material to continue until individual addressees say it must stop; moreover, each citizen, and not some governmental official, makes the evaluation of the material he has received (cf. *Rowan*, *supra*, 397 U.S. at 737-738).

himself and sexual mail, a wall that "no advertiser may penetrate without [the citizen's] acquiescence." *Rowan, supra,* 397 U.S. at 738.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

FEBRUARY 1977.

---

[6]Petitioner's additional contentions are insubstantial. The court of appeals was entitled, in the interest of expedition, to apply the Federal Rules of Evidence to these cases, rather than to remand them to the district court solely for that purpose (Pet. App. 15a-18a). Moreover, both courts below properly rejected petitioner's allegation (Pet. 24-25) that the Postal Service engaged in selective enforcement by seeking compliance orders against petitioner, while declining to do so against material mailed by the American Civil Liberties Union. See Pet. App. 68a-69a. No claim of invidious or unconstitutional selectivity has been advanced sufficient to support a claim of selective enforcement. The use of common sense in employing the limited resources available to enforce the Pandering Law is not offensive to anything in the Constitution. *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244; *Oyler* v. *Boles*, 368 U.S. 448.